

1 accordance with GAAS and concluded that Brocade's financial statements fairly presented its
2 financial results in conformity with GAAP.

3 307. In reaching these conclusions, KPMG unreasonably relied on uncorroborated
4 representations by Brocade management and/or unreasonably determined that the stock
5 compensation expense was immaterial to Brocade's financial statements. As a result, KPMG did not
6 comply with GAAS by unreasonably failing to exercise due professional care and skepticism and to
7 obtain sufficient competent evidential matter. Instead, KPMG substituted management
8 representations for competent evidence and failed to take appropriate action to correct Brocade's
9 inconsistent and deficient public disclosures while issuing inaccurate audit reports. Therefore,
10 KPMG deliberately acquiesced in or ratified the dishonest acts of, and receipt of improperly
11 backdated or otherwise manipulated stock options by Brocade insiders.

THE BROCADE BOARD

13 308. The Director Defendants, by their fiduciary duties of care, good faith and loyalty,
14 owed to Brocade a duty to ensure that the Company's financial reporting fairly presented the
15 operations and financial condition of Brocade in all material aspects. In order to adequately carry
16 out these duties, it was and is necessary for the Director Defendants to know and understand the
17 material, non-public information to be disclosed or omitted from the Company's public statements.
18 This material, non-public information included the fact that Brocade's internal controls were non-
19 existent or materially inadequate and that defendants Reyes, Jensen, Byrd and Canova were
20 improperly backdating option grants to themselves, other employees and directors.

21 309. The Director Defendants knew this material information through the Board meetings
22 that occurred since 1999, as well as at meetings of committees of the Board.

310. Despite these duties, the Director Defendants negligently, recklessly and/or
intentionally caused or allowed, by their actions or inactions, the improper stock option grants
discussed herein to be issued and approved since at least 1999.

311. Instead of properly disclosing the improper stock option backdating practices, the
Director Defendants caused or allowed these practices to continue unabated and undisclosed until
June 2006.

312. The standing committees of the Brocade Board responsible for compensation and
oversight are and have been the Compensation Committee and the Audit Committee.

The Compensation Committee

4 313. The Compensation Committee consists of defendants Dempsey, Krause, House and
5 Vaswani with Dempsey serving for over seven years; defendants Krause, House and Vaswani have
6 each served for at least three years. Since 1999, defendants Leslie, Neiman, O'Brien and Krause also
7 served on the Compensation Committee at various times.

8 314. Pursuant to the Compensation Committee Charter, the Committee is charged as
9 follows:

10 The Compensation Committee shall, for each of the Company's executive officers,
11 review and approve such executive officer's (i) annual base salary level; (ii) annual
12 incentive compensation; (iii) long-term incentive compensation; (iv) employment,
severance and change-in-control agreements, if any; and (v) any other compensation,
ongoing perquisites or special benefit items. In so reviewing and approving
executive compensation, the Compensation Committee shall:

- identify corporate goals and objectives relevant to executive compensation (including efforts by the Company to retain such executives and the cost to the Company of each executive's compensation or of all executive compensation as a whole);
- evaluate each executive's performance in light of such goals and objectives and set each executive's compensation based on such evaluation and such other factors as the Compensation Committee deems appropriate and in the best interests of the Company; and
- determine any long-term incentive component of each executive's compensation based on awards given to such executive in past years, the Company's performance, stockholder return and the value of similar incentive awards relative to such targets at comparable companies and such other factors as the Compensation Committee deems appropriate and in the best interests of the Company.

22 The Compensation Committee shall report the results of such review and any
23 action it takes with respect to the compensation of the Company's executive officers
 to the Board.

24 Except for grants and awards to executive officers of the Company, the
25 Compensation Committee may delegate to one or more officers of the Company its
26 authority to make grants and awards under the Company's incentive compensation or
other equity-based plans *as the Compensation Committee deems appropriate and in
accordance with the terms of such plans.*

Disclosure

28 The Compensation Committee shall prepare the report on executive compensation that is required by SEC rules to be included in the Company's annual

1 proxy statement.

2 **Reporting to the Board**

3 The Compensation Committee shall make regular reports to the Board. These
 4 reports shall include a review of any recommendations or issues that arise with
 5 respect to Company compensation and benefits policies, executive compensation and
 any other matters that the Compensation Committee deems appropriate or is
 requested to be included by the Board.

6 315. Accordingly, as members of the Compensation Committee, defendants Dempsey,
 7 Krause, House, Vaswani and Leslie bore direct responsibility to the issuance of option grants under
 8 the Company's Plans. In particular, the Compensation Committee: (i) discharges the Board's
 9 responsibilities relating to compensation of Brocade's executive officers, including evaluation of the
 10 CEO; (ii) produces an annual report on executive compensation for inclusion in Brocade's proxy
 11 statements; and (iii) exercises overall responsibility for approving and evaluating executive officer
 12 compensation plans. Though the Compensation Committee may, according to its charter, delegate
 13 its authority, the committee remained under a duty to ensure that the delegatee, defendant Reyes, acted
 14 in accordance with the Plans.

15 316. Therefore, the members of Brocade's Compensation Committee are responsible for
 16 administering the issuance of option grants under the Company's 1999 Stock Option Plan.
 17 Accordingly, defendants Dempsey, Krause, House, Vaswani and Leslie were responsible to review
 18 the stock option grants to Brocade executives and evaluate the appropriateness of the actions relative
 19 to any authority delegated to defendant Reyes. But, since at least 1999, such defendants
 20 impermissibly delegated their authority to Reyes. Moreover, on June 2003, the Compensation
 21 Committee approved a recommendation to award Reyes 1.1 million options but failed to provide the
 22 terms of the award. Instead, the Compensation Committee delegated to Reyes himself the authority
 23 to choose the terms (*i.e.* grant date and exercise price), thus creating an obvious opportunity for him
 24 to fraudulently manipulate the award to enrich himself. Thus, these Director Defendants did not
 25 fulfill their duties, therefore causing and allowing the Company's executives to obtain unreasonable
 26 and unreported compensation via the backdating of stock option grants.

27 317. The members of the Compensation Committee knew or should have known that: (i)
 28 compensation practices were critical to the Company's success; (ii) executive and employee

1 compensation schemes were heavily dependant upon stock option grants; (iii) Brocade's historical
 2 stock option grants had highly variable grant dates that coincided with patterns of jumps in share
 3 values following stock option grants; and (iv) the delegation of authority to defendant Reyes to
 4 approve substantially all stock options granted to key employees utterly lacked any adequate internal
 5 controls (*i.e.* segregation of duties), which provided Reyes with the opportunity to commit and
 6 conceal unabated and consequent damages fraud on a unmitigated massive scale. Defendants Reyes,
 7 Jensen, Byrd and Canova were unduly compensating Brocade's employees, officers and directors
 8 and thereby permitted or condoned the unlawful practices described herein. Accordingly, through
 9 the improper abdication of their duties and responsibilities as members of the Compensation
 10 Committee, the misconduct of these defendants was a direct and proximate cause of the unlawful
 11 practices alleged herein.

12 **The Audit Committee**

13 318. The Audit Committee consists of defendants Walker, Jones and Rose. Since 1999,
 14 defendants Neiman, Dempsey, Leslie, Sonsini, Paisley, Moore, Krause and O'Brien each served at
 15 various times on the Audit Committee.

16 319. Pursuant to its Charter, the Audit Committee is charged as follows:

17 **Financial Statements, Disclosure and Other Risk Management and Compliance
 18 Matters**

- 19 • Reviewing and discussing with management and the independent auditors the
 20 annual audited financial statements and quarterly unaudited financial
 21 statements, including the Company's disclosures under "Management's
 22 Discussion and Analysis of Financial Condition and Results of Operations,"
 23 prior to filing the Company's Annual Reports on Form 10-K and Quarterly
 24 Reports on Form 10-Q, respectively, with the SEC;
- 25 • Directing the Company's independent auditors to review before filing with
 26 the SEC the Company's interim financial statements included in Quarterly
 27 Reports on Form 10-Q, using professional standards and procedures for
 28 conducting such reviews;
- 29 • Conducting a post-audit review of the financial statements and audit findings,
 30 including any significant suggestions for improvements provided to
 31 management by the independent auditors;
- 32 • Reviewing before release the unaudited quarterly operating results in the
 33 Company's quarterly earnings release;

- 1 • Overseeing compliance with the requirements of the SEC for disclosure of
2 auditor's services and audit committee members, member qualifications and
activities;
- 3 • Reviewing on a continuing basis the adequacy of the Company's system of
4 internal controls, including meeting periodically with the Company's
management and the independent auditors to review the adequacy of such
5 controls and to review before release the disclosure regarding such system of
internal controls required under SEC rules to be contained in the Company's
6 periodic filings and the attestations or reports by the independent auditors
relating to such disclosure;
- 7 • Providing a report in the Company's proxy statement in accordance with the
rules and regulations of the SEC;
- 8 • Reviewing the Company's policies and practices with respect to risk
9 assessment and risk management, including discussing with management the
Company's major financial risk exposures and the steps that have been taken
10 to monitor and control such exposures;
- 11 • Establishing procedures for receiving, retaining and treating complaints
12 received by the Company regarding accounting, internal accounting controls
or auditing matters and procedures for the confidential, anonymous
13 submission by employees of concerns regarding questionable accounting or
auditing matters;
- 14 • If necessary, instituting special investigations with full access to all books,
records, facilities and personnel of the Company;
- 15 • As appropriate, obtaining advice and assistance from outside legal,
accounting or other advisors (without seeking Board of Directors approval);
- 16 • Reviewing, approving and monitoring the Company's code of ethics for its
senior financial officers;
- 17 • Reviewing management's monitoring of compliance with the Company's
18 standards of business conduct and with the Foreign Corrupt Practices Act;
- 19 • Reviewing, in conjunction with counsel, any legal matters that could have a
20 significant impact on the Company's financial statements;
- 21 • Reviewing the Company's financial and accounting reporting compliance
22 relating to its employee benefit plans; and
- 23 • Reviewing and approving in advance any proposed related party transactions.

24 Reporting to the Board

- 25 • At least quarterly, reporting to the Board. This report shall include a review
26 of any issues that arise with respect to the quality or integrity of the
Company's financial statements, the Company's compliance with legal or
27 regulatory requirements, the performance and independence of the
Company's independent auditors, the performance of the internal audit
function and any other matters that the Audit Committee deems appropriate
28 or is requested to be included by the Board;

- At least annually, reviewing and assessing the adequacy of this charter and recommend any proposed changes to the Board for approval; and
- At least annually, evaluating its own performance and report to the Board on such evaluation.

320. During FY:04, the Audit Committee submitted a report incorporating the fabricated financial results for inclusion in Brocade's FY:05 Proxy Statement that provided, in relevant part:

The Audit Committee has reviewed and discussed our audited financial statements for the fiscal year ended October 30, 2004 with our management. In addition, the Audit Committee has discussed with KPMG LLP, our independent auditors, the matters required to be discussed by Statement on Auditing Standards No. 61 (Communications with Audit Committee). The Audit Committee also has received the written disclosures and the letter from KPMG as required by the Independence Standards Board Standard No. 1 (Independence Discussions with Audit Committees) and the Audit Committee has discussed the independence of KPMG LLP with that firm.

Based on the Audit Committee's review of the matters noted above and its discussions with our independent auditors and our management, the Audit Committee recommended to the Board of Directors that the financial statements be included in our Annual Report on Form 10-K.

321. Accordingly, as members of the Audit Committee at some point since at least 1999, defendants Walker, Jones, Rose, Neiman, Dempsey, Leslie, Sonsini, Paisley, Moore, Krause and O'Brien had a special duty to know and understand this material information regarding the stock option grants as set out in the Audit Committee's charter, which provides in relevant part that the Audit Committee is responsible for: (i) assisting the Board in fulfilling its responsibilities for general oversight of the integrity of Brocade's financial statements; (ii) Brocade's compliance with legal and regulatory requirements; (iii) the independent auditors' qualifications and independence; (iv) the performance of Brocade's internal audit function and independent auditors; and (v) risk assessment and risk management. Under the Audit Committee Charter, the Audit Committee assists the Board in the oversight and monitoring of the Company's financial controls, including any improvement or changes to be made in such internal controls.

322. The members of the Audit Committee knew, recklessly disregarded or should have known that Brocade's financial statements were inaccurate and certain stock option grants were improper, because they failed to consider the risks of material misstatement related to matters involving the granting, documenting, accounting and reporting of stock options, and thereby permitted or condoned the unlawful practices described herein. Also, the Audit Committee failed to

1 consider the materially weak internal controls designed to ensure stock option practice complied
 2 with GAAP and SEC rules. Accordingly, defendants Walker, Jones, Rose, Neiman, Dempsey,
 3 Leslie, Sonsini, Paisley, Moore, Krause and O'Brien, through their improper execution of their duties
 4 and responsibilities as members of the Brocade Audit Committee, knew of, or recklessly disregarded
 5 or should have known the unlawful practices at Brocade described herein.

6 **DEMAND FUTILITY ALLEGATIONS AGAINST THE BOARD AT THE TIME THE
 STATE AND FEDERAL DERIVATIVE ACTIONS WERE INITIATED**

7 323. At the time the original complaints were filed in the State Derivative Action and
 8 Federal Derivative Action, the Board consisted of the following nine individuals: defendants House,
 9 Klayko, Moore, Neiman, Paisley, Dempsey, Krause, Vaswani and Walker. No pre-suit demand was
 10 made on that Board of Brocade to institute this action because such a demand would have been a
 11 futile, wasteful and useless act.

12 324. The Board retains and exercises the ultimate responsibility for approving compen-
 13 sation awarded to Brocade's executive officers. This responsibility encompasses the awards of stock
 14 options that were backdated by defendants Reyes, Jensen, Byrd and Canova. Therefore, the
 15 defendants who sat on the Board at the time the original complaints filed in the State Derivative
 16 Action and Federal Derivative Action face a substantial likelihood of personal liability for failing to
 17 fulfill their fiduciary duties to Brocade in acquiescing to Reyes, Jensen, Byrd and Canova's improper
 18 scheme, by implicitly approving the option grants as dated, as well as for their utter failure to
 19 implement effective internal controls. Such defendants reasonably could and should have properly
 20 informed themselves of the circumstances surrounding the options granted to Brocade's executives
 21 before approving them. Indeed, these options were routinely approved by the Board when they were
 22 dated at or near the Company's lowest closing price for the respective month in which the options
 23 were granted, establishing that these decisions were not informed. Accordingly, there was and is
 24 reason to doubt that defendants House, Klayko, Moore, Neiman, Paisley, Dempsey, Krause,
 25 Vaswani and Walker were and are disinterested because they face a sufficient likelihood of liability
 26 for their breaches of fiduciary duty to Brocade. The Board's decision to approve the options also
 27
 28

1 was not the product of valid business judgment. Thus, demand was futile as to House, Klayko,
 2 Moore, Neiman, Paisley, Dempsey, Krause, Vaswani and Walker.

3 325. The Compensation Committee of the Board is specifically responsible under its
 4 charter for granting stock options or other equity awards to Brocade executives. This responsibility,
 5 although held by the Board, is delegated to the Compensation Committee. But as alleged herein, the
 6 Compensation Committee impermissibly delegated its responsibility to defendant Reyes in total
 7 contravention of its charter, which states, in pertinent part, as follows:

8 *Purpose*

9 The purpose of the Compensation Committee of the Board of Directors (the
 10 "Board") of Brocade Communications Systems, Inc. (the "Company") shall be to
 11 discharge the Board's responsibilities relating to compensation of the Company's
 12 executive officers. *The Compensation Committee has overall responsibility for (i)*
overseeing the Company's compensation and benefits policies generally; (ii)
overseeing, evaluating and approving executive officer compensation plans,
policies and programs; and (iii) preparing the report on executive compensation that
 13 is required by Securities and Exchange Commission rules to be included in the
 Company's annual proxy statement.

14 *Reporting to the Board*

15 The Compensation Committee shall make regular reports to the Board. These
 16 reports shall include a review of any recommendations or issues that arise with
 17 respect to Company compensation and benefits policies, executive compensation and
 any other matters that the Compensation Committee deems appropriate or is
 requested to be included by the Board.

18 From at least 2000 to April 2007, defendant Dempsey was a member of the Compensation
 19 Committee, and was its Chairman from 2005 to April 2007. He also sat on the Audit Committee
 20 from at least 2000 to 2004. Defendant Krause has been a member of the Compensation Committee
 21 since 2004, and sat on the Audit Committee from 2005 to April 2006. Defendant House has been a
 22 member of the Compensation Committee since January 2006, and also sat on this committee from
 23 November 2004 to January 2005. Defendant Vaswani has sat on the Compensation Committee since
 24 2004, and has been its Chairman since 2007. As members of the Compensation Committee, these
 25 defendants were responsible to review and grant stock options granted to Brocade executives during
 26 their respective tenures on the committee. These defendants did not fulfill this duty because they did
 27 not act to inform themselves of the circumstances surrounding these option grants, thereby causing
 28 or allowing the Company's executives to obtain unreasonable and unreported compensation via the

1 backdating of stock option grants. In fact, Krause, House, Dempsey and Vaswani completely
 2 abdicated their duties to Reyes. Between fiscal years 2000-2004, the Compensation Committee held
 3 only nine meetings, and did not even meet in fiscal year 2000 – all of which indicates that the
 4 Company suffered from having a Compensation Committee that met only sporadically and devoted
 5 patently inadequate time and effort to its work. Accordingly, there was and is a reasonable doubt
 6 that Dempsey, Krause, House and Vaswani were disinterested because they face a sufficient
 7 likelihood of liability for their breaches of fiduciary duty to Brocade. The Compensation
 8 Committee's decision to approve the options also was not the product of valid business judgment.
 9 Thus, demand was futile as to Dempsey, Krause, House and Vaswani.

10 326. The Audit Committee of the Board is responsible under its charter for reviewing the
 11 Company's financial and accounting reporting compliance relating to its employee benefit plans.
 12 Since at least 1999, the Audit Committee was comprised, at various times, of defendants Dempsey,
 13 Paisley, Moore, and Krause. Dempsey sat on this committee from at least 2000 to 2004. Paisley
 14 was member of this committee, and its Chairman, from August 2002 to April 2006. Moore sat on
 15 this committee from 2003 to November 2005, and finally, Krause was a member of this committee
 16 from 2005 to April 2006. As members of the Audit Committee, these defendants were responsible
 17 for ensuring that Brocade's internal controls were adequate and that the Company's quarterly and
 18 annual financial statements were accurate. Brocade's internal controls, however, were deficient as
 19 evidenced by the ability of defendants Reyes, Jensen, Byrd and Canova to perpetrate the improper
 20 backdating of stock option grants for almost seven years. As a result of the improper option
 21 backdating, the Company's financials were rendered inaccurate because those financials did not
 22 account for the true amount of compensation being granted to Brocade's executives and employees.
 23 Accordingly, there was and is a reasonable doubt that Paisley, Moore, Krause and Dempsey were
 24 disinterested because they face a sufficient likelihood of liability for their breaches of fiduciary duty
 25 to Brocade. Thus, demand was futile as to defendants House, Neiman, Paisley, Dempsey, Krause
 26 and Vaswani, directors who abdicated their fiduciary duties to Reyes' compensation committee of
 27 one.

28

1 327. On or about September 1999, the Board abdicated its duties with respect to the
 2 granting of stock options to defendant Reyes under the 1998 Plan, who effectively became a
 3 committee of one. Reyes maintained that authority throughout the period in which certain insiders,
 4 including Reyes, oversaw the stock option manipulation. The decision to grant Reyes this
 5 unchecked authority and to allow him to maintain that authority was not the product of valid
 6 business judgment. This is because the Board consciously disregarded the fabricated Compensation
 7 Committee minutes and other documents that defendants Reyes, Jensen and others used to carry out
 8 their scheme. Accordingly, demand was futile as to defendants Dempsey, Neiman, Vaswani and
 9 Krause.

10 328. All of the members of the Board at the time of the original complaints filed in the
 11 State Derivative Action and Federal Derivative Action authorized and/or permitted the false state-
 12 ments disseminated directly to the public or made directly to securities analysts and which were
 13 made available and distributed to shareholders, authorized and/or permitted the issuance of various
 14 of the false and misleading statements and are principal beneficiaries of the wrongdoing alleged
 15 herein, and thus could not fairly and fully prosecute such a suit even if such suit was instituted by
 16 them.

17 329. As a result of their access to and review of internal corporate documents,
 18 conversations and connections with other corporate officers, employees and directors, and
 19 attendance at management and Board meetings, each of the members of the Board at the time the
 20 original complaints were filed in the State Derivative Action and Federal Derivative Action knew the
 21 adverse, non-public information regarding the improper accounting and its detrimental impact on the
 22 Company's reported earnings. While in possession of this material adverse, non-public, information
 23 regarding the Company, the following defendants participated in the illegal insider selling:

24 (a) Defendant Klayko sold 408,000 shares of Brocade stock for proceeds of
 25 \$2,061,440 while in possession of material non-public information; and

26 (b) Defendant Dempsey sold 136,824 shares of Brocade stock for proceeds of
 27 \$15,205,898.50 while in possession of material non-public information.

28

1 Because these defendants received an illicit personal financial benefit from the challenged insider
 2 trading transactions, these defendants were and are interested. They also face a sufficiently
 3 substantial threat of liability for their illegal insider selling. Since these directors breached their
 4 fiduciary duties and were and are interested, any demand upon them would have been futile.

5 330. The principal professional occupation of defendant Klayko was his employment with
 6 Brocade, pursuant to which he received and continues to receive substantial monetary compensations
 7 and other benefits. Specifically, Klayko was paid the following compensation:

Fiscal Year	Securities			Non-Equity			All Other Compensation
	Salary	Bonus	Restricted Stock Awards	Underlying Options	Options Grants	Incentive Plan Compensation	
2007	\$605,000	-	\$1,042,457	-	\$1,125,975	1,299,314	\$18,333
2006	\$540,000	\$1,743,050	\$779,999	166,667	-	-	\$22,403
2005	\$481,364	\$341,951	-	1,600,000	-	-	\$3,587
2004	\$283,333	\$195,230	-	575,000	-	-	\$4,664
2003	\$175,000	\$42,464	-	713,781	-	-	\$3,324

12 Accordingly, at the time the original complaints in the State Derivative Action and Federal
 13 Derivative Action were filed, Klayko lacked independence from Dempsey, Krause, House and
 14 Vaswani – defendants who were not disinterested and/or independent and who exerted dispositive
 15 influence over Klayko's compensation. The Compensation Committee has the authority to review
 16 and approve Klayko's base salary, bonus and equity compensation. Therefore, this lack of
 17 independence rendered Klayko incapable of impartially considering a demand to commence and
 18 vigorously prosecute this action.

19 331. Defendant Moore, by his specialized financial expertise and position as a member of
 20 the Audit Committee, was in a unique position to understand the business of Brocade, as well as its
 21 finances, markets and present and future business prospects. Specifically, Moore holds a B.S. in
 22 Accounting. He was Global Chairman, CEO - U.S. of the PricewaterhouseCoopers LLP ("PwC")
 23 accounting firm from July 1998 until June 2001. Prior to that, he was Chairman and CEO of the
 24 Coopers & Lybrand LLP accounting firm from October 1994 until June 1998. His qualifications led
 25 to Moore's appointment to the Audit Committee – a position that he held from 2003 to November
 26 2005. Thus, because of his unique education, skills and experience, as well as his position as a
 27 member of the Audit Committee, Moore had a heightened duty to ensure the accuracy and fairness

1 of Brocade's financials. Nevertheless, Moore faces a sufficient likelihood of liability because he
 2 breached his duties by causing or allowing the improper financial statements described herein, and
 3 by utterly failing to cause the Audit Committee to create, implement and maintain a system of
 4 internal controls that would have timely detected and/or prevented the stock option backdating
 5 misconduct alleged herein. As a result, any demand upon him would have been futile.

6 332. Defendant Paisley, by his specialized financial expertise and position as Chairman of
 7 the Audit Committee, was perfectly positioned to understand the business of Brocade, as well as its
 8 finances, markets and present and future business prospects. Specifically, Paisley has a B.A. in
 9 Economics and an M.B.A. He has been the Dean's Executive Professor of Accounting and Finance
 10 in the Leavy School of Business at Santa Clara University since January 2001. From September
 11 1985 until May 2000, Paisley was the Senior Vice President of Finance and Chief Financial Officer
 12 of 3Com Corporation. These qualifications led to Paisley's ascension as a director to become the
 13 Chairman of the Audit Committee – a position that he held from August 2002 to April 2006. Thus,
 14 because of his unique education, skills and experience, as well as his position as Chairman of the
 15 Audit Committee, Paisley had a heightened duty to ensure the accuracy and fairness of Brocade's
 16 financials. Nevertheless, Paisely faces a sufficient likelihood of liability because he breached his
 17 duties by causing or allowing the improper financial statements described herein, and by utterly
 18 failing to cause the Audit Committee to create, implement and maintain a system of internal controls
 19 that would have timely detected and/or prevented the stock option backdating misconduct alleged
 20 herein. As a result, any demand upon Paisley would have been futile.

21 333. The entire Brocade Board participated in the wrongs complained of herein. Brocade's
 22 directors were and are not disinterested or independent due to the following: defendants House,
 23 Klayko, Moore, Neiman, Paisley, Dempsey, Krause, Vaswani and Walker served on the Brocade
 24 Board during the period in which Company executives were improperly backdating their stock
 25 option grants. Pursuant to their specific duties as Board members, each was charged with the
 26 management of the Company and to conduct its business affairs. Each of the above-referenced
 27 defendants breached the fiduciary duties that they owed to Brocade and its shareholders in that they
 28 failed to prevent and correct the improper stock option backdating practices and utterly failed to

1 implement a system of internal controls that would have prevented or timely detected the backdating
 2 activity alleged herein. Thus, the Brocade Board cannot exercise independent objective judgment in
 3 deciding whether to bring this action and vigorously prosecute it because such directors were and are
 4 interested: it is their actions that have subjected Brocade to damages in the form of substantial costs
 5 that the Company has expended and continues to face, as more particularly alleged herein.

6 334. A number of the members of the Board as it was constituted at the time that the
 7 original complaints in the State Derivative Action and Federal Derivative Action were filed, because
 8 of their inter-related business, professional and personal relationships, have developed debilitating
 9 conflicts of interest that prevented them from taking the necessary and proper action on behalf of the
 10 Company as requested herein. In addition to the conflicts that exist as a result of their participation
 11 in the option backdating, improper accounting and insider selling, as detailed herein, the majority of
 12 the Board, as it was constituted at the time the original complaints were filed in the State Derivative
 13 Action and Federal Derivative Action, including the defendants listed below, are subject to the
 14 following prejudicial entanglements:

15 (i) **Defendants Moore and O'Brien Are Long-Time Business Associates:**

16 Defendant O'Brien was a Global Managing Partner of PwC. Defendant
 17 Moore was Global Chairman, CEO-US of PwC from July 1998 to June 2001.
 18 Because of their long-standing and entangling business and professional
 19 relationships, defendant Moore will not take the action requested by plaintiff herein
 20 against defendant O'Brien or the remainder of the Individual Defendants.

21 (ii) **Defendants Klayko and Walker Are Long-Time Business Associates:**

22 Defendant Klayko held various positions at Hewlett-Packard Company prior
 23 to 1995. Defendant Walker held various positions at Hewlett-Packard Company for
 24 24 years until he resigned in 1999. Because of their long-standing and entangling
 25 business and professional relationships, neither Klayko nor Walker will take the
 26 action requested by plaintiff herein against one another or the remainder of the
 27 Individual Defendants.

28 (iii) **Defendants Paisley and Krause Are Long-Term Business Associates:**

29 Defendant Paisley was the Senior Vice President of Finance and CFO of
 30 3Com Corp. from 1985 to 2000. Defendant Krause served as President and CEO of
 31 3Com Corp. from 1981 to 1990, and as its Chairman from 1987 to 1993. Because of
 32 their long-standing and entangling business and professional relationships, neither
 33 Paisley nor Krause will take the action requested by plaintiff herein against one
 34 another or the remainder of the Individual Defendants.

(iv) The SLC Intends to Take Action Against 11 Unspecified Defendants

Recently, the SLC informed the Court that it intends to file an Amended Complaint on behalf of the Company to bring claims related to the backdating scheme described herein against eleven unspecified defendants. This action only came after three years of litigation and after the criminal convictions of Jensen and Reyes, demonstrating that the Board at the time of the original filings of this action was unwilling to take action due to prejudicial personal and business relationships between themselves and the defendants.

(v) Defendants Dempsey, Moore and Neiman Interceded in Defendant Reyes' Criminal Trial, Arguing for Leniency:

Prior to defendant Reyes' sentencing, defendants Dempsey, Moore and Neiman (as well as defendant O'Brien) wrote letters to the Court in support of Reyes that were severely antagonistic to the best interests of Brocade.¹⁰

- On September 25, 2007, Dempsey wrote a letter to the Court noting that he personally knew members of Reyes' immediate family, and that Dempsey found Reyes "to be ethical and a man of exceptional character." Dempsey argued against a jail sentence for Reyes.
- On September 20, 2007, Moore wrote to the Court and urged it to show "leniency" in sentencing Reyes. In arguing for leniency, Moore essentially offered a well-crafted "everybody was doing it" sort of argument that had to be "fully understood and weighed very heavily in assessing the punishment."

335. The acts complained of constitute violations of the fiduciary duties owed by Brocade's officers and directors and these acts are incapable of ratification.

336. Brocade has been and will continue to be exposed to significant losses due to the wrongdoing complained of herein, yet the Individual Defendants and Board (as it was constituted at the time the original complaints were filed in the State Derivative Action and Federal Derivative Action) have not filed any lawsuits against themselves or others who were responsible for that wrongful conduct to attempt to recover for Brocade any part of the damages Brocade suffered and will suffer thereby.

¹⁰ These letters are collected at Docket No. 688-6 in *United States of America v. Reyes*, No. 3:06-cr-00556-CRB-1 (N.D. Cal. Jul. 20, 2006).

**DEMAND FUTILITY ALLEGATIONS AGAINST
THE BOARD AT THE TIME OF THE FILING OF THIS ACTION**

337. At the time of the filing of the original complaint in this action, Brocade's Board consisted of the following nine individuals: defendants House, Jones, Klayko, Krause, Rose, Vaswani, Walker, DiPentima and Gerdelman. Plaintiff did not make any demand on the Board to institute this action because such a demand would have been a futile, wasteful and useless act.

338. During February 2008, the Board formed an SLC to investigate the claims asserted on behalf of Brocade in the State Derivative Action and Federal Derivative Action. The SLC consists of DiPentima and Gerdelman. The formation of the SLC is an admission that the remaining members of the Board lack the independence and disinterestedness needed to objectively and in good faith consider a demand that the Company bring the instant action. Moreover, recently, the SLC had decided to take action against eleven unspecified defendants. This decision, however, only came after three years of litigation and the criminal convictions of Reyes and Jensen. This late decision and the circumstances surrounding it further demonstrate the unwillingness of the majority of the Board to take actions against the defendants named herein. Thus, demand is futile as to defendants House, Jones, Klayko, Krause, Rose, Vaswani and Walker.

339. Demand is futile as to defendants DiPentima and Gerdelman, and they are unfit to serve as members of the SLC, because each of them is interested in the subject matter of this litigation as a result of their breaches of fiduciary duty to Brocade. In particular, these two defendants breached fiduciary duties owed to Brocade by supporting WSGR as Brocade's outside counsel with respect to the litigation despite WSGR's blatant, disabling and non-waivable conflicts of interest. In fact, as members of the Board prior to their appointment to the SLC, DiPentima and Gerdelman supported the filing of various legal memoranda in opposition to motions to disqualify WSGR and force Brocade to retain independent counsel. Moreover, before their appointment to the SLC, DiPentima and Gerdelman – like their fellow directors – supported the Proposed Settlement, which threatens to wipe out Brocade's derivative claims that are worth potentially hundreds of millions of dollars. Indeed, along with other members of the Board, DiPentima and Gerdelman supported various filings by WSGR in federal court intended to move the Proposed Settlement

1 toward a successful final approval by that court. DiPentima and Gerdelman's support of legal
 2 strategies that favor the Individual Defendants' interests at the expense of Brocade's interests is a
 3 breach of fiduciary duty owed to Brocade. Accordingly, DiPentima and Gerdelman are interested
 4 and demand is futile as to these two defendants.

5 340. As alleged herein, the Board is ultimately responsible for approving the compensation
 6 awarded to Brocade's executive officers. Such compensation encompasses the stock options that
 7 were illicitly backdated by defendants Reyes, Jensen, Byrd and Canova. Five members of the Board
 8 were involved in the egregious wrongdoing and remain liable for breaching their fiduciary duties in
 9 connection with Brocade's wrongful compensation practices. Specifically, defendants House,
 10 Klayko, Krause, Walker and Vaswani face sufficiently substantial liability for failing to fulfill their
 11 fiduciary duties to Brocade in acquiescing to Reyes, Jensen, Canova and Byrd's improper scheme
 12 and thereby causing and/or allowing the approval of the challenged option grants as dated.
 13 Therefore, these defendants failed to exercise proper due care in carrying out their duties and
 14 responsibilities as officers and directors of Brocade by consciously permitting the backdating
 15 scheme to remain in place or by being recklessly ignorant in failing to inform themselves of the
 16 illegal circumstances surrounding the options granted to Brocade's directors, executives and other
 17 employees before approving them – including their utter failure to establish a system of internal
 18 controls and oversight mechanisms that could and would have prevented or timely detected the illicit
 19 backdating activity alleged herein. As a result of the misfeasance and complete abdication of their
 20 fiduciary duties by these defendants, improperly-backdated options were routinely granted by Reyes
 21 and peremptorily approved by the Board when they were dated at or near the Company's lowest
 22 closing price for the respective month in which the options were granted, establishing that these
 23 defendants failed to establish any effective internal controls and procedures. Moreover, these defen-
 24 dants allowed the backdating scheme to continue unabated for almost seven years – a patently
 25 unreasonable period of time – which revealed additional materially-deficient internal controls in
 26 connection with the Company's financial reporting and accounting processes. Accordingly, reason-
 27 able doubt exists that defendants House, Klayko, Krause, Walker and Vaswani are able to evaluate
 28 demand in a sufficiently disinterested and independent manner. Further, the acts complained of

1 herein resulted in Brocade's material non-compliance with applicable legal, financial and ethical
 2 regulations that has caused the Company to sustain substantial harm. In this regard, decisions made
 3 by these defendants to invariably approve the options were not the product of valid business
 4 judgment. For all the foregoing reasons, demand was futile as to House, Klayko, Krause, Walker
 5 and Vaswani.

6 341. Seven members of the Board participated in approving the Proposed Settlement,
 7 which purported to globally extinguish all derivative claims against virtually all possible defendants
 8 in all actions arising out of or otherwise related to the improprieties that have been complained of
 9 extensively herein. The Proposed Settlement was patently unfair to the Company and its
 10 shareholders because Brocade has suffered and will continue to suffer harm from defendants'
 11 actions. Under the terms of the Proposed Settlement, the Board may have implemented some
 12 corporate therapeutics, but to the extent the Board decided to do so, it also could have later discarded
 13 any such reforms in the purported exercise of its business judgment – which proved to be routinely
 14 and fatally flawed with regard to the Board's other breaches of fiduciary duty alleged herein.
 15 Further, the Proposed Settlement, if approved, would have provided for absolutely no monetary
 16 relief for the Company. Such a result was plainly contradictory to Brocade's best interests, as the
 17 Company has suffered losses that reach well into the hundreds of millions, if not billions, of dollars
 18 that relate to the backdating caused by the egregious misconduct of the Individual Defendants.
 19 These losses, while massive, are still indeterminate, as the SEC Action and Federal Securities Class
 20 Action remain unresolved. In stark contrast, defendants House, Klayko, Krause, Walker and
 21 Vaswani would escape liability if the Proposed Settlement was approved, as they would receive a
 22 broad release of all claims related to their wrongdoings. As a result, these defendants will be
 23 allowed to walk away unscathed from the tumult and havoc wrought by their own misconduct
 24 whereas Brocade and its shareholders cannot escape from the effects, which will continue to persist
 25 well into the future. This demonstration of unjust enrichment or unfair exchange taken in spite of
 26 the Company's immeasurable losses could not have been the decision of a board of directors
 27 exercising valid business judgment. Motivated by their desire to entrench themselves on the Board
 28 and extinguish liability for themselves, their legal counsel and auditors, the Board approved a

1 settlement that did not represent a fair, reasonable or adequate resolution of the derivative claims
 2 asserted in either the Federal Derivative Action or State Derivative Action, and so has foregone
 3 adherence to their duty to act in furtherance of the Company's best interests. By displacing
 4 Brocade's significant interest in a fair recovery with their unique, personal and economic interests,
 5 the entire Board has also breached their fiduciary duties. Accordingly, reasonable doubt exists as to
 6 the ability of the entire Board to evaluate demand in a sufficiently disinterested and independent
 7 manner. For all the foregoing reasons, demand was futile as to defendants House, Jones, Klayko,
 8 Krause, Rose, Vaswani, Walker, DiPentima and Gerdelman.

9 342. Demand is futile as to defendants House, Jones, Klayko, Krause, Rose, Vaswani,
 10 Walker, DiPentima and Gerdelman for the further reason that based on information and belief,
 11 plaintiff alleges that Tolling Agreement expired as of January 1, 2008, and that these defendants
 12 failed to make reasonable and timely efforts to secure its renewal. In particular, on September 11,
 13 2006, defendant WSGR, acting as counsel for Brocade and defendants House, Krause, Moore,
 14 O'Brien, Paisley, Sonsini, Neiman, Dempsey and Vaswani, wrote a letter to counsel for defendant
 15 Reyes giving notice that House, Krause, Moore, O'Brien, Paisley, Sonsini, Neiman, Dempsey and
 16 Vaswani were terminating the Tolling Agreement "solely as to themselves." This letter further
 17 stated that "while all periods of limitation (statutory or otherwise) will begin to run again forty-five
 18 (45) days from the date of service of this notice upon you as to any claims or causes of action which
 19 Reyes may have against the Directors or which any of them may have against Reyes, the statute of
 20 limitations remains tolled on any claim which Reyes may have against Brocade or which Brocade
 21 may have against Reyes." The fact that these defendants took such action was not publicly disclosed
 22 until well over a year later, when the letter was attached as Exhibit 10.80 to Brocade's Form 10-K for
 23 FY:07 filed on December 21, 2007. The Tolling Agreement expired on its own terms a little over a
 24 week later on January 1, 2008, and plaintiff is unaware of any public disclosures made by Brocade or
 25 other information that would indicate this agreement was renewed or renegotiated with Reyes. Thus,
 26 by failing to take reasonable and necessary steps to secure the renewal of the Tolling Agreement,
 27 defendants House, Jones, Klayko, Krause, Rose, Vaswani, Walker, DiPentima and Gerdelman
 28 materially undermined Brocade's ability to file new claims in a new action against Reyes, who now

1 may be able to defend such claims based on applicable periods of limitation or repose – all of which
 2 would have been tolled with a renewed Tolling Agreement. Such grossly negligent inaction or
 3 ineffective action by House, Jones, Klayko, Krause, Rose, Vaswani, Walker, DiPentima and
 4 Gerdelman further evinces a languid and careless attitude with respect to the protection of Brocade's
 5 ability to seek redress for the damages the Company has suffered as a result of the stock option
 6 backdating scheme quarterbacked by Reyes, and thus, demand is futile as to these defendants.

7 343. The Compensation Committee of the Board is specifically responsible under its
 8 charter for granting stock options or other equity awards to Brocade executives. This responsibility,
 9 although held by the Board, is delegated to the Compensation Committee. This committee,
 10 however, impermissibly delegated its responsibility to Reyes in total contravention of its charter.
 11 The charter for the Compensation Committee states, in pertinent part, as follows:

12 ***Purpose***

13 The purpose of the Compensation Committee of the Board of Directors (the
 14 "Board") of Brocade Communications Systems, Inc. (the "Company") shall be to
 15 discharge the Board's responsibilities relating to compensation of the Company's
 16 executive officers. ***The Compensation Committee has overall responsibility for (i) overseeing the Company's compensation and benefits policies generally; (ii) overseeing, evaluating and approving executive officer compensation plans, policies and programs; and (iii) preparing the report on executive compensation that is required by Securities and Exchange Commission rules to be included in the Company's annual proxy statement.***

18 ***Reporting to the Board***

19 The Compensation Committee shall make regular reports to the Board. These
 20 reports shall include a review of any recommendations or issues that arise with
 21 respect to Company compensation and benefits policies, executive compensation and
 any other matters that the Compensation Committee deems appropriate or is
 requested to be included by the Board.

22 During the Relevant Period, the members of the current Board who sat on the Compensation
 23 Committee were defendants Krause, House and Vaswani, as alleged herein. As members of this
 24 committee, these defendants were responsible to review and grant stock options granted to Brocade
 25 executives during their respective tenures on the committee, and to ensure such grants were made,
 26 documented, accounted for and reported in accordance with the shareholder-approved Plans and
 27 applicable laws and accounting guidelines. These defendants did not fulfill this duty because they
 28 did not act to inform themselves of the illegal circumstances surrounding these option grants, and

1 utterly failed to establish and maintain a system of adequate internal controls and oversight
 2 procedures that could and would have timely detected or prevented the stock option backdating
 3 alleged herein. Such failures by these defendants directly and proximately caused or allowed the
 4 Company's executives to obtain unreasonable and unreported windfall compensation via the
 5 backdating of stock option grants. Accordingly, there is a reasonable doubt that defendants Krause,
 6 House and Vaswani are disinterested because they face a sufficient likelihood of liability for their
 7 breaches of fiduciary duty to Brocade. The Compensation Committee's decision to approve stock
 8 options that were backdated also was not the product of valid business judgment. Thus, demand was
 9 futile as to Krause, House and Vaswani.

10 344. The Audit Committee of the Board is responsible under its charter for reviewing
 11 Brocade's financial and accounting reporting compliance relating to its employee benefit plans.
 12 During the Relevant Period, defendant Krause was a member of the Audit Committee. As a member
 13 of this committee, Krause was responsible for ensuring that Brocade established and implemented a
 14 system of internal controls and oversight procedures in connection with financial reporting and
 15 accounting that were adequate, and that the Company's quarterly and annual financial statements
 16 were not presented in a manner that was materially false or misleading. Brocade's system of internal
 17 controls, however, was non-existent, as evidenced by the unfettered ability of defendants Reyes,
 18 Jensen, Byrd and Canova to perpetrate the improper backdating of stock option grants for almost
 19 seven years. Indeed, with the criminal convictions of Reyes and Jensen, the utter lack of adequate
 20 internal controls relative to the granting, documentation, accounting and reporting of stock options at
 21 Brocade is beyond question. As a result of the improper stock option backdating, the Company's
 22 financials were rendered inaccurate because they did not account for the true amount of
 23 compensation being granted to Brocade's executives and employees. Accordingly, there is a reason-
 24 able doubt that Krause is disinterested because they face a sufficient likelihood of liability for their
 25 breaches of fiduciary duty to Brocade. Thus, demand was futile as to Krause.

26 345. As a result of their access to and review of internal corporate documents,
 27 conversations and connections with other corporate officers, employees and directors, and
 28 attendance at management and Board meetings, each of the members of the current Board knew the

1 adverse, non-public information regarding the improper accounting and its detrimental impact on the
 2 Company's reported earnings. Specifically, while in possession of this material adverse, non-public,
 3 information regarding the Company, defendant Klayko sold 408,000 shares of Brocade stock for
 4 proceeds of \$2,061,440 while in possession of material non-public information. Because Klayko
 5 received an illicit personal financial benefit from the challenged insider trading transactions, he is
 6 interested. Also, Klayko faces a sufficiently substantial threat of liability for his illegal insider
 7 selling. Since Klayko has breached his fiduciary duties and is interested, any demand upon him was
 8 futile.

9 346. The principal professional occupation of defendant Klayko was his employment with
 10 Brocade, pursuant to which he received and continues to receive substantial monetary compensations
 11 and other benefits. Specifically, defendant Klayko was paid the following compensation:

Fiscal Year	Salary			Restricted Stock Awards		Securities Underlying Options		Non-Equity Options Grants		Incentive Plan Compensation		\$18,333 \$22,403 \$3,587 \$4,664 \$3,324
	Salary	Bonus	Stock Awards	Underlying Options	Options Grants	Incentive Plan Compensation	All Other Compensation					
2007	\$605,000	-	\$1,042,457	-	-	\$1,125,975	1,299,314					
2006	\$540,000	\$1,743,050	\$779,999	166,667	-	-	-					\$22,403
2005	\$481,364	\$341,951	-	1,600,000	-	-	-					\$3,587
2004	\$283,333	\$195,230	-	575,000	-	-	-					\$4,664
2003	\$175,000	\$42,464	-	713,781	-	-	-					\$3,324

16 Accordingly, Klayko lacked independence from House, Krause, Vaswani – defendants who are not
 17 disinterested and/or independent and who exert dispositive influence over Klayko's compensation.
 18 The Compensation Committee has the authority to review and approve Klayko's base salary, bonus
 19 and equity compensation. Therefore, this lack of independence rendered Klayko incapable of
 20 impartially considering a demand to commence and vigorously prosecute this action.

21 347. In order to bring this suit, all of the directors of Brocade would be forced to sue
 22 themselves and persons with whom they have extensive business and personal entanglements, which
 23 they will not do, thereby excusing demand. Namely, a number of the current members of the Board,
 24 because of their inter-related business, professional and personal relationships, have developed
 25 debilitating conflicts of interest that prevent the Board members of the Company from taking the
 26 necessary and proper action on behalf of the Company as requested herein. In addition to the
 27 conflicts that exist as a result of their participation in the option backdating, improper accounting and
 28

1 insider selling, as detailed herein *supra*, the majority of the Board, including the defendants listed
 2 below, are subject to the following prejudicial entanglements:

3 (a) ***Klayko and Walker Are Long-Time Business Associates:***

4 Defendant Klayko held various positions at Hewlett-Packard
 5 Company prior to 1995. Defendant Walker held various positions at
 6 Hewlett-Packard Company for 24 years until he resigned in 1999.
 7 Because of their long-standing and entangling business and
 professional relationships, neither defendant Klayko nor defendant
 Walker would take the action requested by plaintiff herein against
 one another or the remainder of the Individual Defendants.

8 348. Each of the members of the Board who were directors during the time the false public
 9 financial statements alleged herein were published authorized and/or permitted the false statements
 10 disseminated directly to the public or made directly to securities analysts and which were made
 11 available and distributed to shareholders, authorized and/or permitted the issuance of various of the
 12 false and misleading statements and are principal beneficiaries of the wrongdoing alleged herein, and
 13 thus could not fairly and fully prosecute such a suit even if such suit was instituted by them.

14 349. A majority of the current Board participated in the wrongs complained of herein.
 15 Defendants House, Klayko, Krause, Walker and Vaswani are not disinterested or independent
 16 because they served on the Board during the period in which Company executives were improperly
 17 backdating their stock option grants. Pursuant to their specific duties as directors, each was charged
 18 with the proper and diligent management of the Company and to conduct its business affairs. Each
 19 of the above-referenced defendants breached the fiduciary duties that they owed to Brocade and its
 20 shareholders in that they failed to prevent and correct the improper stock option backdating
 21 practices, and completely failed to establish and maintain a system of adequate internal controls and
 22 oversight mechanisms to timely prevent, detect and correct the hidden and improper activity related
 23 to the backdating of stock options. Thus, the Board cannot exercise independent objective judgment
 24 in deciding whether to bring this action or whether to vigorously prosecute this action because
 25 House, Klayko, Krause, Walker and Vaswani are interested personally in the outcome as it is their
 26 misconduct that has subjected Brocade to damages as alleged herein.

27 350. The acts complained of constitute violations of the fiduciary duties owed by
 28 Brocade's officers and directors and these acts are incapable of ratification.

1 351. Brocade has been and will continue to be exposed to significant losses due to the
2 wrongdoing complained of herein, yet the Individual Defendants and current Board have not filed
3 any lawsuits against themselves or others who were responsible for that wrongful conduct to attempt
4 to recover for Brocade any part of the damages Brocade suffered and will suffer thereby.

COUNT I

Against the RICO Defendants for Violation of RICO, 18 U.S.C. § 1962(c), Through Conspiracy, Mail and Wire Fraud, Securities Fraud, and Manipulation of Stock Options

352. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

353. Pursuant to 18 U.S.C. §1964(c), plaintiff, derivatively on behalf of Brocade, has and may assert a private right of action against the RICO Defendants for their pattern of racketeering activity in violation of RICO.

354. During the Relevant Period, the RICO Defendants devised and engaged in a scheme whereby they formed a separate enterprise and/or association-in-fact enterprise for the common purpose of illegally manipulating the granting of stock options at Brocade and to attempt to cover up such misconduct by filing false financial statements with the SEC to the direct, obvious, and inescapable injury to the business and property of Brocade.

355. In violation of 18 U.S.C. §1962(c), the RICO Defendants conducted or participated in the affairs of the enterprise identified herein.

356. Plaintiff and Brocade are each "persons" within the meaning of 18 U.S.C. §§1961(3) and 1964(c).

357. The RICO Defendants are "persons" within the meaning of 18 U.S.C. §§1961(3) and 1964(c).

Defendants' RICO Enterprise

358. The RICO "enterprise" within the meaning of 18 U.S.C. §1961(4) is an association-in-fact consisting of defendants Reyes, Jensen, Canova, Byrd, Neiman, Dempsey, Leslie, Paisley, House, Klayko, Moore, Krause, Vaswani, Walker, Jones, Rose, DiPentima, Gerdelman, Bossi, Wall, KPMG and Sonsini (the "RICO Enterprise" or "RICO Defendants").

359. The RICO Enterprise was an ongoing and continuing organization consisting of

1 individuals who associated together for the common or shared purpose of manipulating awards of
 2 stock options at Brocade, attempting to cover up the illegal stock option grants, and seeking to
 3 eliminate the liability of the RICO Defendants and others for the illegal activity. Over a more than
 4 eight-year timeframe during the Relevant Period, the RICO Defendants conspired and acted to
 5 illegally manipulate the granting of stock options at Brocade, cover up the illegal granting of stock
 6 options at the Company, and attempt to eliminate the liability of the RICO Defendants and others for
 7 the illegal activity. As a result of this illegal enterprise, stock options were manipulated, and
 8 materially false financial statements were filed, for the fiscal years 1999 to 2004. Further, the RICO
 9 Defendants were enriched and Brocade was damaged in that it received less money than it should
 10 have when recipients of the options exercised the options. From 1999 to the present, the RICO
 11 Defendants took steps to conceal the illegal activity and to attempt to release culpable defendants
 12 from liability for the illegal conduct, all to the detriment of Brocade.

13 360. At all relevant times, the association of individuals and entities that form the RICO
 14 Enterprise was also associated for the lawful purpose of working for Brocade, serving on the Board
 15 or serving as Brocade's outside auditor.

16 361. The RICO Defendants constructed and implemented a common system of granting
 17 Brocade stock options with exercise prices less than the fair market value of Brocade's stock on the
 18 grant date. This common system involved a scheme whereby stock options were "backdated" by
 19 issuing the options days or weeks after the supposed grant date, and then pricing the options at a low
 20 point in the past instead of pricing the options on the date the options were actually awarded. The
 21 RICO Defendants are distinct individuals, entities or, in the case of KPMG, a partnership.

22 362. The RICO Enterprise affected interstate commerce. It was a further part of said
 23 scheme and artifice, and in furtherance thereof, that the RICO Defendants would and did communi-
 24 cate with each other and with their co-conspirators and others, in person, through mail service
 25 provided by the U.S. Postal Service, by telephone and other interstate and foreign wire facilities.

26 363. For the purpose of executing and attempting to execute the scheme and artifice
 27 described herein, the RICO Defendants and their co-conspirators would and did knowingly place and
 28 cause to be placed in any post office or authorized depository for mail matters and things to be sent

1 and delivered by the United States Postal Service; took and received therefrom such matters and
2 things; and knowingly caused to be delivered by mail according to the direction thereon, and at the
3 place at which it is directed to be delivered by the person to whom it is addressed, any such matters
4 and things, in violation of 18 U.S.C. §1341, including, but not limited to, the instances set forth in
5 the predicate racketeering acts described below.

6 364. For purposes of executing and attempting to execute that scheme and artifice, the
7 RICO Defendants and their co-conspirators would and did knowingly transmit and cause to be
8 transmitted in interstate and foreign commerce by means of wire, radio and television
9 communication writings, signs, signals, pictures and sounds (collectively "Transmissions") in
10 violation of 18 U.S.C. §1343, including, but not limited to, the transmissions set forth in the
11 predicate racketeering acts described below.

Conduct of the Affairs of the RICO Enterprise

13 365. The RICO Defendants conducted or participated in the conduct of the RICO
14 Enterprise in violation of 18 U.S.C. §1962(c). Such conduct and participation was carried out in at
15 least the following ways:

16 (a) Through a conspiracy to commit securities and mail fraud in violation of 18
17 U.S.C. §371. Reyes was convicted of this offense on August 7, 2007. Jensen was convicted of this
18 offense on December 5, 2007;

19 (b) Through knowingly and willingly, directly and indirectly, falsifying and
20 causing to be falsified books, records and accounts of Brocade as to a material matter, in violation of
21 15 U.S.C. §§78m(b)(2)(A), 78m(b)(5) and 78ff(a). Reyes was convicted of this offense on August 7,
22 2007. Jensen was convicted of this offense on December 5, 2007;

23 (c) Through securities fraud, in violation of 15 U.S.C. §§78j(b) and 78ff; 17
24 C.F.R. §240.10b-5, 18 U.S.C. §2;

25 (d) Through filing false SEC filings, in violation of 15 U.S.C. §§78j(b) and 78ff,
26 17 C.F.R. §240.10b-5, 18 U.S.C. §2; and

27 (e) Through violation of 18 U.S.C. §§1341 (mail fraud) and 18 U.S.C. §1343
28 (wire fraud).

1 **The RICO Defendants' Pattern of Racketeering Activity and the Predicate Acts**

2 366. Throughout the Relevant Period, the RICO Defendants knowingly, willfully and
 3 unlawfully conducted or participated, directly or indirectly, in the conduct of the RICO Enterprise
 4 through a pattern of racketeering activity, including multiple predicate acts chargeable under 18
 5 U.S.C. §371, 15 U.S.C. §§78j(b) and 78ff; 17 C.F.R. §240.10b-5, 18 U.S.C. §2, and 15 U.S.C.
 6 §§78m(b)(2)(A), 78m(b)(5) and 78ff(a), in violation of 18 U.S.C. §1962(c).

7 367. From at least as early as 1999, and continuing until the time of filing of this
 8 complaint, the RICO Defendants and others known and unknown did knowingly and intentionally
 9 devise and intend to devise a scheme and artifice to defraud, and obtain money and property from,
 10 members of the public and Brocade by means of materially false and fraudulent pretenses,
 11 representations and promises, and omissions of material facts, knowing that the pretenses,
 12 representations and promises, were false when made.

13 368. The RICO Defendants' activities in furtherance of the RICO Enterprise were ongoing
 14 and continuous over at least eight or more years. These violations constitute a "pattern of
 15 racketeering activity" within the meaning of 18 U.S.C. §1962(c).

16 369. The predicate acts in furtherance of the RICO Enterprise included, but were not
 17 limited to, the following:

18 (a) *Predicate Act No. 1:* Reyes and Jensen backdated Brocade Compensation
 19 Committee minutes so that the minutes falsely reported that a meeting occurred on October 30, 2001
 20 and that stock options were granted on that day and priced at the market value of Brocade's stock on
 21 that day;

22 (b) *Predicate Act No. 2:* Reyes and Jensen backdated Brocade Compensation
 23 Committee minutes so that the minutes falsely reported that a meeting occurred on November 28,
 24 2001 and that stock options were granted on that day and priced at the market value of Brocade's
 25 stock on that day;

26 (c) *Predicate Act No. 3:* Reyes and Jensen backdated Brocade Compensation
 27 Committee minutes so that the minutes falsely reported that a meeting occurred on January 22, 2002
 28

1 and that stock options were granted on that day and priced at the market value of Brocade's stock on
2 that day;

3 (d) *Predicate Act No. 4:* Reyes and Jensen backdated Brocade Compensation
4 Committee minutes so that the minutes falsely reported that a meeting occurred on February 28,
5 2002 and that stock options were granted on that day and priced at the market value of Brocade's
6 stock on that day;

7 (e) ***Common Facts for Predicate Act Nos. 1-4:*** For all of the backdated Compen-
8 sation Committee minutes, Reyes, Jensen and others conspired to commit the substantive crimes
9 noted above. One witness testified that he understood Jensen and Reyes operated together in
10 determining the appropriate retroactive price for option grants.¹¹ Another witness testified that under
11 Jensen's supervision, three possible retroactive grant dates would be selected. Jensen would then
12 take the potential dates to Reyes and return with signed, falsified Compensation Committee meeting
13 minutes. Jensen oversaw and directed Stephen Beyer, Colleen Devine, and Margie Lee in gathering
14 the historical price information for Brocade stock, preparing the false minutes, presenting those
15 minutes to Reyes for his signature, and passing the phony documentation along to the Company's
16 finance department. Jensen screened the pricing information and directed her subordinates to choose
17 a date that was not always the lowest in order to conceal that she and Reyes were selecting low-price
18 dates;

19 (f) *Predicate Act No. 5:* On or about January 24, 2002, Reyes, Canova,
20 Dempsey, Leslie, Neiman and Sonsini filed and signed, and caused Brocade to file, a Form 10-K
21 with the SEC for the fiscal year ended October 27, 2001, in which such defendants knowingly and
22 willfully made and caused Brocade to make untrue statements of material fact and to omit to state
23 material facts necessary to make the statements made not misleading. Specifically, the Form 10-K
24 (1) falsely represented that Brocade did not incur compensation expenses in connection with its

²⁷ ¹¹ References to witness statements derive from testimony taken during the jury trials of either Reyes or Jensen. See *United States of America v. Reyes*, no. 3:06-cr-00556-CRB-1 & 2 (N.D. Cal. Jul. 20, 2006).

1 stock option grants made during fiscal year 2001; (2) omitted to disclose that Brocade granted stock
2 options during fiscal year 2001 with exercise prices that were below the market value of the
3 Company's stock on the grant dates and that Brocade incurred compensation expenses in connection
4 with such stock option grants; (3) falsely represented that Brocade accounted for its stock option
5 grants in accordance with the provisions of APB 25 whereby the difference between the exercise
6 price and the fair market value at the grant date is recognized as compensation expense; and (4)
7 omitted to disclose that fraudulent entries relating to stock option grants were made in the books and
8 records of the Company;

9 (g) **Predicate Act No. 6:** On or about January 22, 2003, Reyes, Canova, Byrd,
10 Dempsey, Neiman, Paisley, Sonsini and KPMG filed, signed, or caused Brocade to file a Form 10-K
11 with the SEC for the fiscal year ended October 26, 2002, in which such defendants knowingly and
12 willfully made and caused Brocade to make untrue statements of material fact and to omit to state
13 material facts necessary to make the statements made not misleading. Specifically, the Form 10-K
14 (1) falsely represented that Brocade did not incur compensation expenses in connection with its
15 stock option grants made during fiscal year 2002; (2) omitted to disclose that Brocade granted stock
16 options during fiscal year 2002 with exercise prices that were below the market value of the
17 Company's stock on the grant dates and that Brocade incurred compensation expenses in connection
18 with such stock option grants; (3) falsely represented that Brocade accounted for its stock option
19 grants in accordance with the provisions of APB 25 whereby the difference between the exercise
20 price and the fair market value at the grant date is recognized as compensation expense; and (4)
21 omitted to disclose that fraudulent entries relating to stock option grants were made in the books and
22 records of the Company. KPMG audited the financial results in the Form 10-K and, notwithstanding
23 its knowledge of the falsity of the aforementioned statements in the Form 10-K, certified that the
24 financial statements complied in all respects with GAAP;

25 (h) ***Predicate Act No. 7:*** On or about January 20, 2004, Reyes, Canova,
26 Dempsey, Neiman, Paisley, Sonsini, Moore and KPMG filed, signed, or caused Brocade to file a
27 Form 10-K with the SEC for the fiscal year ended October 25, 2003, in which such defendants
28 knowingly and willfully made and caused Brocade to make untrue statements of material fact and to

1 omit to state material facts necessary to make the statements made not misleading. Specifically, the
2 Form 10-K (1) falsely represented that Brocade did not incur compensation expenses in connection
3 with its stock option grants made during fiscal year 2003; (2) omitted to disclose that Brocade
4 granted stock options during fiscal year 2003 with exercise prices that were below the market value
5 of the Company's stock on the grant dates and that Brocade incurred compensation expenses in
6 connection with such stock option grants; (3) falsely represented that Brocade accounted for its stock
7 option grants in accordance with the provisions of APB 25 whereby the difference between the
8 exercise price and the fair market value at the grant date is recognized as compensation expense; and
9 (4) omitted to disclose that fraudulent entries relating to stock option grants were made in the books
10 and records of the Company. KPMG audited the financial results in the Form 10-K and,
11 notwithstanding its knowledge of the falsity of the aforementioned statements in the Form 10-K,
12 certified that the financial statements complied in all respects with GAAP;

13 (i) ***Predicate Act No. 8:*** Jensen directed Brocade employees not to use e-mail or
14 voicemail when communicating about the stock option granting process. Jensen also used Steven
15 Beyer and other human resource employees to delete and fabricate evidence of Brocade's
16 backdating;

17 (j) ***Predicate Act No. 9:*** During February 2002, Byrd approved backdated
18 options for new hire Geruson and directed Brocade human resources employees to cover up the act;

19 (k) **Predicate Act No. 10:** Defendants Reyes and Byrd entered into their
20 respective indemnity agreements with Brocade on August 15, 2002. Reyes signed Byrd's agreement,
21 and Byrd signed the agreement for Reyes. Each such agreement purports to create a "private statute
22 of limitations" under which Brocade (or a shareholder derivative plaintiff) would be barred from
23 bringing any legal claim against either Reyes or Byrd after the expiration of two years from the date
24 of accrual of any cause of action giving rise to any such claim. Further, these agreements state that if
25 a claim (broadly defined to include most types of civil or criminal proceedings) against either Reyes
26 or Bryd terminates "by judgment, order, settlement (whether with or without court approval) or
27 conviction, or upon a plea of *nolo contendere*, or its equivalent, shall not create a presumption that
28 Indemnitee did meet any particular standard of conduct or have any particular belief or that a court

1 has determined that indemnification is not permitted by applicable law." These agreements, which
2 were entered into at a time when Reyes and Byrd were fully engaged in moving their backdating
3 scheme forward, were specifically intended by each of them to advance the cause of the RICO
4 Enterprise by eliminating or minimizing their liability exposure to the Company for their misconduct
5 related to the stock option backdating alleged herein. Each such agreement arises out of actions
6 taken by self-interested directors who acted in bad faith to advance their own interests at the expense
7 of Brocade and its shareholders, and are void and unenforceable as against public policy.

14 (m) ***Predicate Act No. 12:*** In 2006, Klayko, Dempsey, House, Krause, Rose,
15 Jones, Vaswani and Walker took action as members of the Board to approve the Proposed
16 Settlement pursuant to which Brocade was to receive no monetary compensation and most of the
17 RICO Defendants and others were to receive complete releases for the illegal conduct. Defendant
18 Wall played an active role in negotiating the Proposed Settlement. This conduct was an integral part
19 of the ongoing conspiracy to cover up the RICO Enterprise and, when that failed, to release the
20 culpable individuals and entities from liability. Sonsini's law firm, WSGR, provided legal advice to
21 Klayko, Dempsey, House, Krause, Rose, Jones, Vaswani and Walker to approve the Proposed
22 Settlement even though WSGR and Sonsini faced a material and incurable conflict of interest in
23 representing Brocade's interests in the settlement discussions. Under the terms of the illusory
24 settlement, both Sonsini and WSGR were to receive complete releases from liability;

25 (n) ***Predicate Act No. 13:*** In January 2007, House, Jones, Klayko, Krause, Rose,
26 Vaswani and Walker caused Brocade to amend its stockholder rights plan, commonly referred to as a
27 "poison pill," to accelerate the expiration of the plan to January 23, 2007, thus terminating the plan.
28 The plan was terminated as part of the conspiracy to eliminate the liability of the RICO Defendants

1 for the racketeering activity, since termination of the plan would greatly facilitate acquisition of
 2 Brocade by another corporation or entity and any merger or acquisition of the Company would
 3 generally, absent certain exceptions, eliminate the liability of the RICO Defendants for shareholder
 4 derivative claims;

5 (o) ***Predicate Act No. 14:*** In the spring of 2007, defendants took action to urge
 6 the federal district court to approve the Proposed Settlement;

7 (p) ***Predicate Act No. 15:*** In May 2007, plaintiffs in the State Derivative Action
 8 filed a motion to disqualify WSGR from representing Brocade or any other party in the State
 9 Derivative Action or Federal Derivative Action due to WSGR's material and incurable conflicts of
 10 interest. As part of the conspiracy to cover up the RICO Enterprise and procure releases for the
 11 RICO Defendants and others, Wall, DiPentima, Gerdelman, House, Jones, Klayko, Krause, Rose,
 12 Vaswani, and Walker caused Brocade in 2007 to oppose this motion to disqualify WSGR as counsel
 13 for the Company in such derivative actions under circumstances in which these defendants had a
 14 fiduciary duty to ensure that Brocade utilized independent counsel and to ensure that WSGR did not
 15 continue to represent parties who were adverse to Brocade;

16 (q) ***Predicate Act No. 16:*** On February 26, 1998, while Brocade was still a
 17 California corporation, the Board – including defendants Neiman and Dempsey – adopted the 1998
 18 Plan. At the meeting, these directors – again including Neiman and Dempsey – also passed a
 19 resolution delegating to the Company's CEO the authority to make stock option awards under the
 20 1998 Equity Incentive Plan to employees other than Section 16 officers. However, this authorization
 21 was only effective upon the IPO, which subsequently happened in May 1999. This resolution
 22 constituted an abdication of the duties owed by Neiman and Dempsey to Brocade as members of the
 23 Board and as members of the Compensation Committee. Thus, when Reyes became CEO of
 24 Brocade in January 1999, he was not authorized, acting alone, to issue any stock options because the
 25 Company had not yet conducted an IPO of its stock. Moreover, once the IPO occurred, Reyes was
 26 only authorized to issue stock options *under the 1998 Plan and not under any other plan*. The
 27 Board never passed an authorization similar to the February 26, 1998 resolution that gave Reyes
 28 authority to issue stock options under the 1999 Plan or any subsequent plan. The Board never did so

1 until February 21, 2001. Thus, all stock options issued by Reyes under Brocade's 1999 Stock Option
 2 Plan at any time from 1999 to February 21, 2001 were and are completely void. Moreover,
 3 Brocade's Compensation Committee had actual knowledge that Reyes was not authorized to issue
 4 stock options under the 1999 Plan or later plans. As noted above Neiman and Dempsey were present
 5 at the February 26, 1998 Board meeting and voted to authorize Reyes to issue options under the
 6 1998 Plan. Thus, they knew that Reyes, who was not a member of the Compensation Committee,
 7 could only issue options pursuant to a valid resolution of the full Board. The rest of the directors
 8 also knew this because the stock options plans very clearly state that options may only be issued by
 9 the full Board or a committee of the Board acting pursuant to a valid delegation of authority. Thus,
 10 all members of the Board acted with knowledge or gross recklessness in allowing Reyes to issue
 11 options under the 1999 Plan and later plans with no authority to issue such options;

12 (r) ***Predicate Act No. 17:*** In February 1999, Brocade was still a California
 13 corporation and still was privately held. It had not yet completed an IPO. Nevertheless, Reyes
 14 began to issue stock options as a "committee of one." Between February 19, 1999 and May 23,
 15 1999, Reyes issued hundreds of thousands of unauthorized and void stock options. Defendants
 16 Neiman, Dempsey, Leslie and Sonsini were aware that Reyes was acting without authority and
 17 conspired with Reyes by: (i) allowing him to issue stock options without a proper delegation; and (ii)
 18 allowing him to issue backdated stock options;

19 (s) ***Predicate Act No. 18:*** At a March 17, 1999 Board meeting, defendants
 20 Neiman, Dempsey, Leslie, Reyes and Sonsini passed a resolution combining the 1995 Equity
 21 Incentive Plan, 1998 Plan and 1998 Executive Equity Incentive Plan into the 1999 Plan, effective
 22 upon closing of the IPO. However, they did not pass a resolution authorizing Reyes to act as a
 23 "committee of one" with respect to options issued under the 1999 Plan. Thus, they consciously
 24 permitted Reyes to continue to issue awards under the 1999 Plan without a proper delegation.

25 (t) ***Predicate Act No. 19:*** Reyes continued to issue stock options as a "committee
 26 of one" throughout 1999 and up to and including February 21, 2001. During that time, Reyes issued
 27 hundreds of thousands of stock options. During this entire time, the Board never passed a resolution
 28 authorizing Reyes to issue stock options under the 1999 Plan. Nevertheless, the members of the

1 Compensation Committee and the rest of the Board consciously continued to allow Reyes to issue
2 options as a "committee of one" and to issue backdated stock options; and

3 (u) ***Predicate Act No. 20:*** On February 21, 2001, defendants Reyes, Dempsey,
4 Leslie, Neiman and Sonsini, constituting all the members of the Board at the time, issued a
5 resolution pursuant to a "Unanimous Written Consent." Under the February 21, 2001 UWC, these
6 defendants authorized Reyes for the first time to grant nonstatutory stock options to non-executive
7 officer employees at Brocade under Brocade's 1999 Plan. The UWC authorized Reyes to issue such
8 options to the indicated employees "in his sole discretion." This UWC represented a blatant breach
9 of fiduciary duty by Reyes, Dempsey, Leslie, Neiman and Sonsini since Reyes had already been
10 issuing options "in his sole discretion" under the 1999 Plan for two years. Moreover, Dempsey,
11 Leslie, Neiman and Sonsini knew Reyes was backdating stock options, knew Reyes had no authority
12 to do so, and passed the UWC in furtherance of the conspiracy to facilitate and empower Reyes.
13 Further, as members of the Compensation Committee, Neiman, Dempsey and Leslie had been
14 explicitly vested with the responsibility to issue stock options under the 1999 Plan by the full Board
15 in October 1999. The delegation of sole discretion to Reyes constituted an abdication of the
16 fiduciary duties owed by Neiman, Dempsey and Leslie as members of the Compensation Committee.

17 370. Pursuant to 18 U.S.C. §1964, the RICO Defendants are liable to plaintiff derivatively
18 on behalf of Brocade for threefold the actual damages sustained by Brocade, plus the costs of
19 bringing this suit, including reasonable attorney's fees.

Damages Caused by the RICO Enterprise

21 371. The RICO Defendants' violations of 18 U.S.C. §1962(c) directly and proximately
22 caused, and continue to cause, Brocade to be injured in its business or property by an aggregate
23 amount in excess of \$100 million. The damages caused to Brocade include, but are not limited to,
24 fines paid to the SEC, costs of investigation and restatement of its financial results, the advancement
25 of attorney fees to some of the RICO Defendants and others under indemnification agreements,
26 being named as a defendant in the securities fraud class action litigation before this Court, loss of
27 income when the manipulated stock options were exercised by the option recipients at lower exercise
28 prices, and tax and other damages.

COUNT II

Against the RICO Defendants for Conspiracy to Violate RICO, 18 U.S.C. §1962(c)

3 372. Plaintiff incorporates by reference and realleges each and every allegation contained
4 above, as though fully set forth herein.

5 373. Throughout the Relevant Period, the RICO Defendants knowingly, willfully and
6 unlawfully conspired and agreed with each other to conduct or participate, directly and indirectly, in
7 the conduct of the affairs and activities of the RICO Enterprise, through a pattern of racketeering
8 activity, including acts chargeable under 18 U.S.C. § 71, 15 U.S.C. §§78j(b) and 78ff; 17 C.F.R.
9 §240.10b-5, 18 U.S.C. §2, and 15 U.S.C. §§8m(b)(2)(A), 78m(b)(5) and 78ff(a), in violation of 18
10 U.S.C. §1962(c) and (d), by agreeing to the objective of the conspiracy and/or by agreeing to commit
11 at least two of the criminal predicate acts alleged herein. The predicate acts alleged above are
12 specifically incorporated herein by this reference and are realleged as if fully set forth herein

13 374. The objects of the conspiracy were to illegally manipulate the granting of stock
14 options at Brocade, conceal such illegal manipulation, and eliminate the liability of the RICO
15 Defendants through securities fraud, conspiracy, making false entries in Brocade's books and
16 records, filing false financial statements with the SEC, causing Brocade to retain WSGR, a
17 materially conflicted law firm, and entering into and advocating court approval of the Proposed
18 Settlement. Such objections were to be achieved and were achieved through the wrongful predicate
19 acts alleged herein. The conspiracy and predicate acts alleged herein were affectuated through
20 Transmissions in order to conduct or facilitate interstate commerce.

375. The RICO Defendants' violations of 18 U.S.C. §1962(d) directly and proximately
caused, and continue to cause, Brocade to be injured in its business or property by an aggregate
amount in excess of \$100 million. The damages caused to Brocade include, but are not limited to,
fines paid to the SEC, costs of investigation and restatement of its financial results, the advancement
of attorney fees to the RICO Defendants and others under indemnification agreements, being named
as a defendant in the Federal Securities Class Action, loss of income when the manipulated stock
options were exercised by the option recipients at lower exercise prices, and tax and other damages.

28 376. In accordance with 18 U.S.C. §1964, the RICO Defendants are liable to plaintiff

1 derivatively on behalf of Brocade for threefold the actual damages sustained by Brocade, plus the
 2 costs of bringing this suit, including reasonable attorney's fees.

3 **COUNT III**

4 **Against Defendants Reyes and Canova for Disgorgement
 5 under the Sarbanes-Oxley Act of 2002**

6 377. Plaintiff incorporates by reference and realleges each and every allegation set forth
 7 above, as though fully set forth herein.

8 378. Section 304 of Sarbanes-Oxley provides that if a public company prepares an
 9 accounting restatement due to material non-compliance with any financial reporting requirement
 10 under federal securities laws, and such non-compliance resulted from misconduct, then the
 11 company's CEO and CFO must reimburse the company for certain payments made by the company
 12 to those executives. Section 304, entitled "Forfeiture of Certain Bonuses and Profits," provides in
 13 full:

14 (a) **Additional compensation prior to noncompliance with
 15 commission financial reporting requirements.** If an issuer is required to
 16 prepare an accounting restatement due to the material non-compliance of the
 17 issuer, as a result of misconduct, with any financial reporting requirement
 18 under the securities laws, *the chief executive officer and chief financial
 19 officer of the issuer shall reimburse the issuer for* –

20 1. any bonus or other incentive-based or equity-based
 21 compensation received by that person from the issuer during the 12-
 22 month period following the first public issuance or filing with the
 23 Commission (whichever first occurs) of the financial document
 24 embodying such financial reporting requirement; and
 25 2. any profits realized from the sale of securities of the issuer
 26 during that 12-month period.

27 (b) **Commission exemption authority.** The Commission may exempt
 28 any person from the application of subsection (a), as it deems necessary and
 appropriate.

29 379. Brocade has restated its fiscal 2002 through first fiscal quarter 2005 financial
 30 statements due to the material non-compliance of such statements with federal securities laws
 31 reporting requirements. These restatements resulted from "misconduct" within the meaning of
 32 Section 304 of the SOX. As a result, defendants Reyes and Canova, Brocade's former CEO and

1 CFO, are required to reimburse Brocade for all bonuses or other incentive-based or equity-based
 2 compensation received by them from the Company during the period July 30, 2002 (the date of
 3 enactment of the SOX) through January 29, 2005 (the end date of Brocade's first fiscal quarter
 4 2005).

5 380. Further, defendants Reyes and Canova are liable to Brocade for any profits realized
 6 from the sales of securities by the Company during that same period of time.

7 381. Defendants Reyes and Canova are also liable to plaintiffs for reasonable costs and
 8 attorneys' fees in the prosecution of this derivative action on behalf of Brocade.

9

COUNT IV

Against Defendants Reyes, Jensen, Neiman, Dempsey and Sonsini for Causing Brocade to Violate §10(b) of the Exchange Act and Rule 10b-5 Promulgated Thereunder

12 382. Plaintiff incorporates by reference and realleges each and every allegation contained
 13 above, as though fully set forth herein.

14 383. Defendants Reyes, Jensen, Neiman, Dempsey and Sonsini caused Brocade to
 15 disseminate public statements that falsely reported Brocade's compensation expenses due to the
 16 illegal stock option manipulations perpetrated by the Individual Defendants as alleged herein. The
 17 Individual Defendants knew that the Company's public statements concerning its compensation
 18 expenses were misleading and intended to deceive, manipulate and/or defraud in connection
 19 therewith.

20 384. As such, defendants Reyes, Jensen, Neiman, Dempsey and Sonsini caused Brocade to
 21 violate Section 10(b) of the Exchange Act and SEC Rule 10b-5 in that they caused the Company to:

22 (a) Employ devices, schemes and artifices to defraud;
 23 (b) Make untrue statements of material facts or omitted to state material facts
 24 necessary in order to make the statements made, in light of the circumstances under which they were
 25 made, not misleading; or

26 (c) Engage in acts, practices and a course of business that operated as a fraud or
 27 deceit upon Brocade's shareholders in connection with their purchases of Brocade common stock at
 28 times relevant.

1 385. Brocade's violation of Section 10(b) of the Exchange Act and SEC Rule 10b-5 caused
 2 an artificial inflation of the Company's stock price. The Insider Selling Defendants took advantage
 3 of this artificial inflation by selling over \$1.5 billion worth of shares of Brocade's common stock at
 4 inflated prices while in possession of material non-public information. These defendants
 5 misappropriated Brocade's proprietary information and violated their so-called "abstain or disclose"
 6 duties under the federal securities laws when they sold Brocade stock without disclosing the
 7 information alleged to have been concealed herein.

8 386. As a result of defendants Reyes, Jensen, Neiman, Dempsey and Sonsini's misconduct,
 9 Brocade was exposed to massive liability as alleged in the Federal Securities Class Action. Under
 10 the terms of the settlement reached in that action, Brocade must pay \$160 million. The Federal
 11 Securities Class Action alleged that Brocade violated Section 10(b) of the Exchange Act and SEC
 12 Rule 10b-5 and was liable to a class of shareholders. In turn, defendants Reyes, Jensen, Neiman,
 13 Dempsey and Sonsini are liable to Brocade for the damages that the Company faced in the securities
 14 class action.

15

COUNT V

Against the Individual Defendants for Breach of Fiduciary Duty for Approving Improperly-Dated Stock Option Grants to Brocade's Employees and Executive Officers

18 387. Plaintiff incorporates by reference and realleges each and every allegation contained
 19 above, as though fully set forth herein.

20 388. The Individual Defendants owed and owe Brocade fiduciary obligations. By reason
 21 of their fiduciary relationships, the Officer Defendants and Director Defendants owed and owe
 22 Brocade the highest obligation of good faith, fair dealing, loyalty and due care.

23 389. The Individual Defendants, and each of them, violated and breached their fiduciary
 24 duties of care, loyalty, reasonable inquiry, oversight, good faith and supervision.

25 390. Each of the Individual Defendants had actual or constructive knowledge that they had
 26 approved the improper backdating of stock option grants and the corresponding issuance of
 27 inaccurate financial results that did not properly account for the stock option grants and failed to
 28

1 correct or prevent these improprieties. These actions could not have been a good faith exercise of
2 prudent business judgment to protect and promote the Company's corporate interests.

3 391. As a direct and proximate result of the Individual Defendants' failure to perform their
4 fiduciary obligations, Brocade has sustained significant damages. For example, the backdating
5 harmed Brocade's reputation and ruined a potential multi-billion dollar transaction with Cisco. As a
6 result of the misconduct alleged herein, the Individual Defendants are liable to the Company.

7 392. Plaintiff on behalf of Brocade has no adequate remedy at law.

COUNT VI

**Against Defendants Dempsey, House, Klayko, Krause, Rose, Vaswani and Walker for
Breach of Fiduciary Duty for Approving the Proposed Settlement**

11 393. Plaintiff incorporates by reference and realleges each and every allegation contained
above, as though fully set forth herein.

394. Defendants Dempsey, House, Klayko, Krause, Rose, Vaswani and Walker owed and
13 owe Brocade fiduciary obligations. By reason of their fiduciary relationships, these defendants owed
14 and owe Brocade the highest obligation of good faith, fair dealing, loyalty and due care.

16 395. Defendants Dempsey, House, Klayko, Krause, Rose, Vaswani and Walker, and each
17 of them, violated and breached their fiduciary duties of care, loyalty and good faith by approving the
Proposed Settlement.

19 396. Each of defendants Dempsey, House, Klayko, Krause, Rose, Vaswani and Walker
20 approved the Proposed Settlement on behalf of the Company. As detailed in great particularity
21 herein, the Individual Defendants and defendant KPMG were each involved in the egregious
22 wrongdoing which caused Brocade substantial harm. Under the terms of the Proposed Settlement,
23 however, the Company would have implemented some corporate governance changes but also would
24 have recovered nothing for the substantial monetary losses alleged in the Federal Derivative Action,
which are similar to those alleged here.

26 397. As a direct and proximate result of defendants Dempsey, House, Klayko, Krause,
27 Rose, Vaswani and Walker's failure to perform their fiduciary obligations, if the Proposed
28 Settlement had been approved, Brocade would never have recovered for its losses that KPMG and
the Individual Defendants, including Dempsey, House, Klayko, Krause, Vaswani and Walker,

1 caused the Company. As a result of the misconduct alleged herein, Dempsey, House, Klayko,
 2 Krause, Rose, Vaswani and Walker are liable to the Company.

3 398. Plaintiff on behalf of Brocade has no adequate remedy at law.

4 **COUNT VII**

5 **Against the Insider Selling Defendants for Violation of
 6 California Corporations Code Section 25402**

7 399. Plaintiff incorporates by reference and realleges each and every allegation set forth
 above, as though fully set forth herein.

8 400. At the time that the Insider Selling Defendants sold their Brocade common stock as
 9 set forth herein, by reason of their high executive and/or directorship positions with Brocade, the
 10 Insider Selling Defendants had access to highly material information regarding the Company,
 11 including the information set forth herein regarding the true adverse facts concerning defendants'
 12 backdating practices. Further, the Insider Selling Defendants cashed in their illegally-backdated
 13 stock options and sold them for over \$1.5 billion in proceeds.

14 401. At the time of such sales, that information was not generally available to the public or
 15 the securities markets. Had such information been generally available, it would have significantly
 16 reduced the market price of Brocade shares at that time.

17 402. The Insider Selling Defendants, and each of them, had actual knowledge of material,
 18 adverse, non-public information and thus sold their Brocade common stock in California in violation
 19 of California Corporations Code section 25402.

20 403. Pursuant to California Corporations Code section 25502.5, the Insider Selling
 21 Defendants, and each of them, are liable to Brocade for damages in an amount up to three times the
 22 difference between the price at which Brocade common stock was sold by the defendants, and each
 23 of them, and the market value which that Brocade common stock would have had at the time of the
 24 sale if the information known to the defendants, and each of them, had been publicly disseminated
 25 prior to that time and a reasonable time had elapsed for the market to absorb the information.

COUNT VIII

Against the Director Defendants for Violation of California Corporations Code Section 25403

404. Plaintiff incorporates by reference and realleges each and every allegation set forth above, as though fully set forth herein.

405. The Director Defendants, through their positions, possessed control and influence over the Insider Selling Defendants' sale of Brocade common stock in violation of the California Corporations Code. The Director Defendants are statutorily liable to the same extent as the Insider Selling Defendants under California Corporations Code section 25403.

406. The Director Defendants were aware of the Insider Selling Defendants' knowledge of the material adverse non-public information and the Director Defendants were aware of the Insider Selling Defendants' intent to sell Brocade common stock while in possession material adverse non-public information.

407. The Director Defendants are culpable for the Insider Selling Defendants' underlying violations of California Corporations Code section 25402 because of their knowledge and ability to control and influence the Insider Selling Defendants and because their involvement in preparing and/or approving financials that improperly accounted for the Company's compensation expenses related to grants of stock options to Brocade officers, directors and employees.

408. Under California Corporations Code section 25403, the Director Defendants, and each of them, are liable to Brocade for damages in an amount up to three times the difference between the price at which Brocade common stock was sold by the Insider Selling Defendants, and each of them, and the market value which that Brocade common stock would have had at the time of the sale if the information known to the Individual Defendants, and each of them, had been publicly disseminated prior to that time and a reasonable time had elapsed for the market to absorb the information.

COUNT IX

Against the Insider Selling Defendants for Breach of Fiduciary Duties for Insider Selling and Misappropriation of Information

409. Plaintiff incorporates by reference and realleges each and every allegation set forth above, as though fully set forth herein.

410. At the time of the stock sales set forth herein, the Insider Selling Defendants knew the information described above, and sold Brocade common stock on the basis of such information.

411. The information described above was proprietary non-public information concerning the Company's illegal granting of backdated stock options. It was a proprietary asset belonging to the Company, which the Insider Selling Defendants used for their own benefit when they sold Brocade common stock.

412. The Insider Selling Defendants' sales of Brocade common stock while in possession and control of this material adverse, non-public information was a breach of their fiduciary duties of loyalty and good faith.

413. Since the use of the Company's proprietary information for their own gain constitutes a breach of the Insider Selling Defendants' fiduciary duties, the Company is entitled to the imposition of a constructive trust on any profits the Insider Selling Defendants obtained thereby.

COUNT X

Against All Defendants for Conspiracy to Breach Fiduciary Duties

414. Plaintiff incorporates by reference and realleges each and every allegation set forth above, as though fully set forth herein.

415. In committing the wrongful acts alleged herein, the Individual Defendants, defendant KPMG and defendant WSGR have pursued, or joined in the pursuit of, a common course of conduct, and have acted in concert with and conspired with one another in furtherance of their common plan or design. In addition to the wrongful conduct herein alleged as giving rise to primary liability, the Individual Defendants, KPMG and WSGR further aided and abetted and/or assisted each other in breach of their respective duties.

416. During all times relevant hereto, the Individual Defendants, defendant KPMG and defendant WSGR collectively and individually initiated a course of conduct that was designed to and

1 did: (i) conceal the fact that Company executives were improperly backdating their stock option
2 grants; (ii) maintain the Individual Defendants' executive and directorial positions at Brocade and the
3 profits, power and prestige that the Individual Defendants enjoyed as a result of these positions; (iii)
4 deceive the shareholders of Brocade regarding the level of compensation being paid to the
5 Company's executives and the Company's financial condition; and (iv) artificially inflate the price of
6 Brocade common stock so they could dispose of over \$1.5 billion of their personally-held stock. In
7 furtherance of this plan, conspiracy and course of conduct, the Individual Defendants, KPMG and
8 WSGR collectively and individually took the actions set forth herein.

9 417. The Individual Defendants, defendant KPMG and defendant WSGR engaged in a
10 conspiracy, common enterprise and/or common course of conduct. During this time the Individual
11 Defendants, KPMG and WSGR caused the Company to conceal the true fact that Brocade was
12 misrepresenting its financial results and that Brocade executives were improperly backdating their
13 stock option grants.

14 418. The purpose and effect of the conspiracy, common enterprise, and/or common course
15 of conduct by and among the Individual Defendants, defendant KPMG and defendant WSGR was,
16 among other things, to grant themselves undisclosed and unaccounted for compensation in the form
17 of backdated stock option grants and to disguise the Individual Defendants' breaches of fiduciary
18 duties, unjust enrichment, violations of state law prohibitions on insider selling codified in California
19 Corporations Code sections 25402 and 25403 and corporate waste.

20 419. The Individual Defendants, defendant KPMG and defendant WSGR accomplished
21 their conspiracy, common enterprise and/or common course of conduct by causing the Company to
22 purposefully, recklessly or negligently misrepresent its financial results. Because the actions
23 described herein occurred under the authority of the Board, each of the Individual Defendants was a
24 direct, necessary and substantial participant in the conspiracy, common enterprise and/or common
25 course of conduct complained of herein.

26 420. Each of the Individual Defendants, defendant KPMG and defendant WSGR aided and
27 abetted and rendered substantial assistance in the wrongs complained of herein. In taking such
28 actions to substantially assist the commission of the wrongdoing complained of herein, each

1 Individual Defendant, defendant KPMG and defendant WSGR acted with knowledge of the primary
 2 wrongdoing, substantially assisted the accomplishment of that wrongdoing, and was aware of his or
 3 her overall contribution to and furtherance of the wrongdoing.

4 421. As a direct and proximate result of the conspiracy, common enterprise and/or
 5 common course of conduct by and among the Individual Defendants, defendant KPMG and
 6 defendant WSGR to breach their fiduciary obligations, Brocade has sustained significant damages.
 7 As a result of the misconduct alleged herein, the Individual Defendants, KPMG and WSGR are
 8 liable to the Company.

9 422. Plaintiff on behalf of Brocade has no adequate remedy at law

10 **COUNT XI**

11 **Against the Defendants Reyes, Jensen, Canova and Byrd for Fraud and Deceit Pursuant to
 12 California Civil Code Sections 1709 and 1710**

13 423. Plaintiff incorporates by reference and realleges each and every allegation set forth
 above, as though fully set forth herein.

14 424. California Civil Code section 1709 provides that "[o]ne who willfully deceives
 15 another with intent to induce him to alter his position to his injury or risk, is liable for any damage"
 16 suffered as a result of the deceit.

17 425. California Civil Code section 1710 provides as follows: "A deceit, within the
 18 meaning of is either:

19 (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to
 20 be true;

21 (2) The assertion, as a fact, of that which is not true, by one who has no reasonable
 22 ground for believing it to be true,

23 (3) The suppression of a fact, by one who is bound to disclose it or who gives
 24 information of other facts which are likely to mislead for want of communication of that fact; or

25 (4) A promise, made without any intention of performing it."

26 426. Due to the following, defendants Reyes, Jensen, Canova and Byrd committed
 27 fraudulent deceit within the meaning of California Civil Code sections 1709 and 1710:
 28

1 (a) Said defendants knowingly manipulated internal Brocade documents as
2 alleged herein to provide false grant dates of stock options granted by the Company;

3 (b) Said defendants had actual knowledge that the backdated stock option grants
4 were not granted on the stated date and therefore did not conform to Brocade's stock option plans,
5 employment contracts or other applicable compensation policies under which the Board had
6 authorized such options to be awarded;

7 (c) Said defendants intended that Brocade rely on their false, material
8 representations as alleged above to the detriment of the Company;

9 (d) Brocade reasonably believed and relied on the actions taken and
10 representations made by said defendants in connection with the backdating of stock options; and

11 (e) As a proximate result of such reliance, the Company incurred damages,
12 including costs of over \$73 million paid out to outside counsel, accounting firms and consultants to
13 prepare the restatements and to respond to the governmental investigations and enforcement actions
14 and \$7 million in fines in connection with the governmental investigations and enforcement actions,
15 a market capitalization loss of over \$9.1 billion and approximately \$3.5 to \$4.5 million paid in the
16 tender offer. Moreover, Brocade has advanced at least \$46,709,323 in legal fees and expenses to
17 Reyes and \$7,140,253 in legal fees and expenses to Jensen for their legal defenses.

18 427. Pursuant to California Civil Code sections sections 1709 and 1710, Reyes, Jensen,
19 Canova and Byrd are liable to Brocade for punitive damages.

COUNT XII

Against All Defendants for Unjust Enrichment

22 428. Plaintiff incorporates by reference and realleges each and every allegation set forth
23 above, as though fully set forth herein.

24 429. By their wrongful acts and omissions, the Individual Defendants were unjustly
25 enriched at the expense of and to the detriment of Brocade. These wrongful acts included the
26 approval of improperly-backdated stock options by the Director Defendants as well as the receipt of
27 underserved compensation in connection with those options by the Officer Defendants.

1 430. Plaintiff, as a shareholder and representative of Brocade, seeks restitution from these
2 defendants, and each of them, and seeks an order of this Court disgorging all profits, benefits and
3 other compensation obtained by these defendants, and each of them, from their wrongful conduct
4 and fiduciary breaches.

COUNT XIII

Against the Individual Defendants for Waste of Corporate Assets

7 431. Plaintiff incorporates by reference and realleges each and every allegation contained
8 above, as though fully set forth herein.

9 432. As a result of the improprieties alleged herein, and by failing to properly consider the
10 interests of the Company and its public shareholders by failing to conduct proper supervision,
11 defendants have caused Brocade to waste valuable corporate assets and incur costs to conduct
12 investigations, hire outside counsel, accounting firms and consultants, and to direct manpower to the
13 task of restating Brocade's past financials to correct for the improperly-backdated stock option
14 grants.

15 433. As a result of the waste of corporate assets, the Individual Defendants are liable to the
16 Company.

17 434. Plaintiff on behalf of Brocade has no adequate remedy at law.

COUNT XIV

Against Defendant Reyes for Declaratory Relief

20 435. Plaintiff incorporates by reference and realleges each and every allegation contained
21 above, as though fully set forth herein.

22 436. On July 20, 2006, the United States Attorney for the Northern District of California
23 brought criminal charges against defendant Reyes. On August 7, 2007, following a trial by jury,
24 defendant Reyes was convicted for one count of conspiracy to commit securities and mail fraud in
25 violation of 18 U.S.C. §371, one count of securities fraud in violation of 15 U.S.C. §§78j(b) and
26 78ff, 17 C.F.R. §240.10b-5; 18 U.S.C. §2, three counts of filing false documents with the SEC in
27 violation of 15 U.S.C. §§78j(b) and 78ff, 17 C.F.R. §240.10b-5; 18 U.S.C. §2, one count of
28 falsifying Brocade's books, and records and accounts in violation of 15 U.S.C. §§78m(b)(2)(A),

1 78m(b)(5) and 78ff, 17 C.F.R. §240.13b2; 18 U.S.C. §2, and four counts of making a false statement
2 to an accountant in violation of 15 U.S.C. §§78ff, 17 C.F.R. §240.13b2-2, and 18 U.S.C. §2.

3 437. Brocade has advanced at least \$46,709,323 in legal fees and expenses to defendant
4 Reyes pursuant to, *inter alia*, the Company's certificate of incorporation, bylaws, Reyes'
5 indemnification agreement, California Corporations Code section 317, California Labor Code
6 section 2802 and 8 Delaware Code section 145. The Company advanced such funds to Reyes to
7 defray legal fees and expenses that he incurred in connection with his defense of the criminal action
8 filed against him, as well as in connection with investigations and other litigation arising out of the
9 same misconduct that gave rise to the criminal action, including investigations by the Company and
10 SEC, shareholder class and derivative actions, and the enforcement action filed by the SEC.

11 438. Defendant Reyes must return all monies advanced to him as alleged herein to
12 Brocade, because under applicable law the Company may not indemnify Reyes for acts that: (i) were
13 not in good faith; (ii) were not in the best interests of the Company; and (iii) were unlawful. As
14 alleged herein and found by a jury at his criminal trial, Reyes' actions were in bad faith, not in
15 Brocade's best interest, and were unlawful.

16 439. Accordingly, plaintiff seeks a declaration that defendant Reyes is not entitled to
17 indemnification from Brocade and must therefore return all advanced legal fees, expenses and other
18 monies to the Company.

19 440. Plaintiff does not concede the validity of any indemnification agreements entered into
20 between Brocade and defendant Reyes.

COUNT XV

Against Defendant Jensen for Declaratory Relief

23 441. Plaintiff incorporates by reference and realleges each and every allegation contained
24 above, as though fully set forth herein.

25 442. On July 20, 2006, the United States Attorney for the Northern District of California
26 brought criminal charges against defendant Jensen. On December 5, 2007, following a jury trial,
27 Jensen was convicted following a jury trial on December 5, 2007 on two criminal counts –
28 conspiracy to falsify books, records and accounts in violation of 18 U.S.C. §371; and falsifying

1 books, records and accounts in violation of 15 U.S.C. §§78m(b)(2)(A), 78m(b)(5), 78ff, and 17
 2 C.F.R. §240.13b2-1, all arising out of her role in the illegal employee compensation scheme that
 3 took place at Brocade.

4 443. Brocade has advanced at least \$7,140,253 in legal fees and expenses to defendant
 5 Jensen pursuant to, *inter alia*, the Company's certificate of incorporation, bylaws, Jensen's
 6 indemnification agreement, California Corporations Code section 317, California Labor Code
 7 section 2802 and 8 Delaware Code section 145. The Company advanced such funds to Jensen to
 8 defray legal fees and expenses that she incurred in connection with her defense of the criminal action
 9 filed against her, as well as in connection with investigations and other litigation arising out of the
 10 same misconduct that gave rise to the criminal action, including investigations by the Company and
 11 SEC, shareholder class and derivative actions, and the enforcement action filed by the SEC.

12 444. Defendant Jensen must return all monies advanced to her as alleged herein to Brocade
 13 because under applicable law, the Company may not indemnify Jensen for acts that: (i) were not in
 14 good faith; (ii) were not in the best interests of the Company; and (iii) were unlawful. As alleged
 15 herein and found by a jury at her criminal trial, Jensen's actions were in bad faith, not in Brocade's
 16 best interest, and were unlawful.

17 445. Accordingly, plaintiff seeks a declaration that defendant Jensen is not entitled to
 18 indemnification from Brocade and must therefore return all advanced legal fees, expenses and other
 19 monies to the Company.

20 446. Plaintiff does not concede the validity of any indemnification agreements entered into
 21 between Brocade and defendant Jensen.

22 COUNT XVI

23 **24 Against Defendants House, Klayko, Deranleau, Malavalli, Canova, Byrd, Dempsey,
 Vaswani, Krause, Walker, Neiman, Moore, Paisley, O'Brien, Sonsini and Leslie for
 Declaratory Relief**

25 447. Plaintiff incorporates by reference and realleges each and every allegation contained
 26 above, as though fully set forth herein.

27 448. As alleged herein, defendants House, Klayko, Deranleau, Malavalli, Canova, Byrd,
 28 Dempsey, Vaswani, Krause, Walker, Neiman, Moore, Paisley, O'Brien, Sonsini and Leslie engaged

1 in willful breaches of fiduciary duties owed to Brocade in bad faith. In connection with this and
2 other lawsuits, Brocade has advanced millions of dollars in legal fees and expenses to such
3 defendants based upon the Company's obligations pursuant to, *inter alia*, its certificate of
4 incorporation, bylaws, indemnification agreements, California Corporations Code section 317,
5 California Labor Code section 2802 and 8 Delaware Code section 145.

6 449. Defendants House, Klayko, Deranleau, Malavalli, Canova, Byrd, Dempsey, Vaswani,
7 Krause, Walker, Neiman, Moore, Paisley, O'Brien, Sonsini and Leslie must return all monies
8 advanced to them as alleged herein to Brocade, because under applicable law, the Company may not
9 indemnify these defendants for acts that: (i) were not in good faith; (ii) were not in the best interests
10 of the Company; and (iii) were unlawful. As alleged herein, actions taken by these defendants were
11 in bad faith, not in Brocade's best interest, and were unlawful.

12 450. Accordingly, plaintiff seeks a declaration that defendants House, Klayko, Deranleau,
13 Malavalli, Canova, Byrd, Dempsey, Vaswani, Krause, Walker, Neiman, Moore, Paisley, O'Brien,
14 Sonsini and Leslie are not entitled to indemnification from Brocade and must therefore return all
15 advanced legal fees, expenses and other monies to the Company.

16 451. Plaintiff does not concede the validity of any indemnification agreements entered into
17 between Brocade and any defendant or non-party.

COUNT XVII

Against the Individual Defendants for Declaratory Relief

20 452. Plaintiff incorporates by reference and realleges each and every allegation contained
21 above, as though fully set forth herein.

22 453. As alleged herein, defendant Reyes granted numerous stock options under the Plans at
23 times in which he had no authority to grant such options. All stock options granted by Reyes
24 between May 1999 and February 2001 are void because Reyes did not have authority to grant such
25 options.

26 454. All stock options granted by Reyes after February 2001 are also void because the
27 Board did not properly delegate its authority to grant stock option under the 1999 Plan. The Board

1 attempted to make this delegation via a UWC, which was not effective because it was not preceded
 2 by an in-person meeting of the Board and after consultation with counsel.

3 455. All backdated stock option grants, whether or not granted by defendant Reyes, are
 4 void because such options violated the Plans under which they were granted.

5 456. Accordingly, plaintiff seeks a declaration that the stock options grants described
 6 above are void and incapable of ratification. Plaintiff also seeks a declaration that all attempted
 7 ratifications of these stock option grants were ineffectual.

8 **COUNT XVIII**

9 **Direct Individual Claim for Declaratory and Injunctive Relief
 10 Against the Individual Defendants**

11 457. Plaintiff incorporates by reference and realleges each and every allegation contained
 12 above as though fully set forth herein.

13 458. Plaintiff brings this cause of action directly in her individual capacity, and in such
 14 capacity, seeks only declaratory and injunctive relief.

15 459. The stock options granted by Brocade were not issued in conformity with the
 16 Company's shareholder-approved stock option plans, violated applicable laws and regulations, and
 17 therefore were and are void. The stock options were also issued for an improper purpose – *i.e.* to
 18 unjustly enrich the recipients of the options.

19 460. The recipients of the stock options were unjustly enriched as a result of their receipt
 20 of the stock option grants, which has proximately caused damage to Brocade.

21 461. Brocade also has been damaged by the improper granting, documenting, accounting
 22 and reporting of the backdated stock option grants.

23 462. Plaintiff seeks a declaration and determination that the Brocade stock options that
 24 were issued in non-conformity with the shareholder-approved stock option plans, and which violated
 25 applicable laws and regulations, were and are void and/or constitute waste. Plaintiff also seeks
 26 injunctive relief in two forms: (a) a constructive trust imposed over whatever profits or other
 27 benefits the Individual Defendants may have received upon the exercise of any backdated stock
 28 options so that such funds are not dissipated pending a ruling on the declaratory relief sought by

1 plaintiff; and (b) a preliminary and permanent injunction that prohibits the Individual Defendants
 2 from exercising any backdated stock option grant.

3 **COUNT XIX**

4 **Professional Negligence and Accounting Malpractice
 5 Against Defendant KPMG**

6 463. Plaintiff incorporates by reference and realleges each and every allegation contained
 7 above as though fully set forth herein.

8 464. Defendant KPMG issued "clean" or unqualified opinions on Brocade's financial
 9 statements issued between 2002 and the present, stating that those financial statements were
 10 presented in accordance with GAAP based on KPMG's audits which were performed in accordance
 11 with GAAS. GAAS, as approved and adopted by the AICPA, governs the conduct of audit
 12 engagements. In fact, the audit reports were false and misleading due to, among other things,
 13 KPMG's failure to conduct the audits in accordance with GAAS, and the fact that Brocade's financial
 14 statements issued between 2002 and 2004 were not prepared in conformity with GAAP. KPMG's
 15 reports were therefore in violation of GAAS, GAAP and SEC rules.

16 465. The objective of audits of financial statements by the independent auditor is the
 17 expression of an opinion on the fairness with which they present, in all material respects, financial
 18 position, results of operations and cash flows in conformity with GAAP. The auditor's report is the
 19 medium through which he expresses his opinion or, if circumstances require, disclaims an opinion.
 20 In either case, he states his audit has been in accordance with GAAS. These standards require him to
 21 state whether, in his opinion, the financial statements are presented in accordance with GAAP and to
 22 identify those circumstances in which such principles have not been consistently observed in the
 23 preparation of the financial statements of the current period in relation to those of the preceding
 24 period. AU § 110.01.

25 466. GAAS as approved and adopted by the membership of the AICPA, are comprised of
 26 ten general standards. These standards to a great extent are interrelated and interdependent. The
 27 independent auditor is responsible for compliance with GAAS in an audit engagement. The ten
 28 general standards are as follows:

(a) General Standards

2 (i) The audit is to be performed by a person or persons having adequate
3 technical training and proficiency as an auditor.

4 (ii) In all matters relating to the assignment, independence in mental
5 attitude is to be maintained by the auditor or auditors.

6 (iii) Due professional care is to be exercised in the performance of the audit
7 and the preparation of the report.

(b) Standards of Fieldwork

9 (iv) The work is to be adequately planned and assistants, if any, are to be
10 properly supervised.

11 (v) A sufficient understanding of the internal control structure is to be
12 obtained to plan the audit and to determine the nature, timing and extent of tests to be performed.

13 (vi) Sufficient competent evidential matter is to be obtained through
14 inspection, observation, inquiries, and confirmations to afford a reasonable basis for an opinion
15 regarding the financial statements under audit.

(c) Standards of Reporting

17 (vii) The report shall state whether the financial statements are presented in
18 accordance with GAAP.

19 (viii) The report shall identify those circumstances in which such principles
20 have not been consistently observed in the current period in relation to the preceding period.

21 (ix) Informative disclosures in the financial statements are to be regarded
22 as reasonably adequate unless otherwise stated in the report.

23 (x) The report shall either contain an expression of opinion regarding the
24 financial statements, taken as a whole, or an assertion to the effect that an opinion cannot be
25 expressed. When an overall opinion cannot be expressed, the reasons therefore should be stated. In
26 all cases where an auditor's name is associated with financial statements, the report should contain a
27 clear-cut indication of the character of the auditor's work, if any, and the degree of responsibility the
28 auditor is taking.

1 467. Defendant KPMG's audits of Brocade's financial statements issued for fiscal years
 2 2002 through 2004, inclusive, violated each of the general standards.

3 468. Defendant KPMG is one of the largest international firms of certified public
 4 accountants. KPMG was the auditor of Brocade's financial statements from fiscal year 2002 to the
 5 present. In addition, they were paid to review the quarterly financial statements of Brocade
 6 throughout this period. KPMG audited Brocade's financial statements issued from fiscal year 2002
 7 to the present, and issued their audit opinions stating that those financial statements were fairly
 8 presented in accordance with GAAP, and that they had audited those financial statements in
 9 accordance with GAAS. Both of those statements were false. KPMG either knew or should have
 10 been aware of facts that undeniably precluded them from making those statements at the time they
 11 were made. Brocade's financial statements and KPMG's opinions on them were then used by the
 12 Company with KPMG's consent to publicly disseminate Brocade's financial results in the filing of
 13 their annual Forms 10-K with the SEC.

14 469. Defendant KPMG was negligent in failing to comply with GAAS as Brocade's
 15 independent accountant. Brocade issued unqualified opinions stating that the financial statements of
 16 Brocade were fairly presented in accordance with GAAP, when they were aware of or should have
 17 been aware of facts and circumstances that undermined such unqualified opinions and rendered them
 18 false and misleading.

19 470. In the course of performing their audit services, defendant KPMG reasonably could
 20 have obtained evidential matter revealing the adverse facts detailed above about Brocade's
 21 undisclosed compensation, but improperly failed to require them to adjust their financial statements
 22 or make disclosure of such facts. As a result of their investigations and audit work, KPMG
 23 reasonably should have known that the reports and financial statements described herein were
 24 materially misleading or negligently disregarded facts that showed that all such statements were
 25 materially misleading.

26 471. Because: (a) defendant KPMG spoke regularly with Brocade Board and Audit
 27 Committee members who were knowledgeable about the undisclosed option practices; and (b)
 28 KPMG attended certain of Board and Audit Committee meetings where legal compliance was

1 discussed, KPMG knew or negligently disregarded facts that indicated that they should have: (i)
2 qualified their opinions on Brocade's financial statements issued for fiscal years 2002 through 2004,
3 inclusive; or (ii) required the Company to adjust its financial statements; or (iii) refused to give
4 opinions in light of the materially adverse effects of the undisclosed facts about Brocade's financial
5 condition, including the material overstatement of earnings based on the fact that Brocade's
6 compensation expenses were being materially understated. The failure to make such qualification,
7 correction, modification or withdrawal was a violation of GAAS, including the Fourth Standard of
8 Reporting.

9 472. Defendant KPMG failed to require Brocade to disclose material adverse facts and
10 allowed the Company to make material misrepresentations to their shareholders and to the investing
11 public.

12 473. Defendant KPMG violated GAAS General Standard No. 3, which requires that due
13 professional care must be exercised by the auditor in performance of the examination and the
14 preparation of the audit report.

15 474. Defendant KPMG violated GAAS Standard of Field Work No. 2, which requires the
16 auditor to make a proper study of existing internal controls, to determine whether reliance thereon
17 was justified, and if such controls are not reliable, to expand the nature and scope of the auditing
18 procedures to be applied. KPMG reasonably should have known that Brocade's internal controls
19 were insufficient yet still failed to expand their auditing procedures.

20 475. Defendant KPMG violated GAAS Standard of Field Work No. 3, which requires
21 sufficient competent evidential matter be obtained through inspection, observation, inquiries and
22 confirmations to afford a reasonable basis for an opinion to be issued on the subject financial
23 statements. As described above, KPMG failed to obtain sufficient competent evidential matter as to
24 Brocade's accounting and disclosure practices related to the timing and granting of stock option
25 grants.

26 476. Defendant KPMG violated GAAS Standard of Reporting No. 1, which requires the
27 audit report to state whether the financial statements are presented in accordance with GAAP.
28

1 KPMG's opinions falsely represented that Brocade's financial statements complied with GAAP,
 2 when KPMG knew or negligently disregarded that they did not for the reasons herein alleged.

3 477. Defendant KPMG violated GAAS Standard of Reporting No. 4, which requires, when
 4 an opinion on the financial statements as a whole cannot be expressed, that the reasons be stated.
 5 KPMG should have either stated that no opinion could be issued by them on Brocade's financial
 6 statements or issued an adverse opinion stating that the financial statements were not fairly
 7 presented.

8 478. Defendant KPMG violated Standard of Field Work No. 1 and the standards set forth
 9 in AU sections 310, 320 and 327 by, among other things, failing to adequately plan their audit and
 10 properly supervise the work of their assistants so as to establish and carry out procedures reasonably
 11 designed to search for and detect the existence of errors and irregularities that would have a material
 12 effect upon the financial statements.

13 479. Defendant KPMG violated SAS No. 16 in that they failed to perform their
 14 examination with an attitude of professional skepticism and, in connection with the audits of
 15 Brocade's financials, ignored numerous "red flags" that would reasonably have led to the discovery
 16 of the Individual Defendants' backdating practices and the resulting gross understatement of
 17 compensation expenses and overstatement of Brocade's earnings.

18 480. Defendant KPMG violated AU section 316.20, which requires that additional
 19 procedures should be performed when evaluation at the financial-statement level indicates
 20 significant risk.

21 481. As a result of the foregoing, defendant KPMG's certification of Brocade's financial
 22 statements issued between 2002 and the present falsely represented that the statements were audited
 23 pursuant to GAAS and that Brocade's financial statements were presented in conformity with GAAP.
 24 KPMG knew that such certification was false and misleading because, as detailed herein: (a) KPMG
 25 knew or were negligent in not knowing that the Company's financial statements violated GAAP; and
 26 (b) KPMG knew they had not complied with GAAS.

27 482. As a result of the services rendered to Brocade, KPMG's personnel were present at
 28 their corporate headquarters and major operating offices and examined or participated in reviews,

1 investigations and audit procedures regarding the financial condition, business operations and
2 financial, accounting and management-control systems of Brocade. In the course of performing such
3 services, KPMG had virtually unlimited access to substantial evidential matter revealing the adverse
4 facts about the Company's compliance with educational finance reporting requirements and laws and
5 the finances of Brocade, but improperly failed to require adjustment for or disclosure of such facts.

6 483. Defendant KPMG: (a) knew or were negligent in not knowing of the material,
7 adverse, non-public information about the financial statements of Brocade, which was not disclosed;
8 and (b) participated in drafting, reviewing and/or approving the misleading statements, releases,
9 reports and other public representations of and about Brocade pleaded herein, involving the SEC
10 reports on Form 10-K.

11 484. In performing auditing and accounting services on behalf of Brocade and engaging in
12 the wrongful acts alleged herein, defendant KPMG knew or should have known that their clients
13 would, and did, transmit false and misleading financial information to the investing public.
14 However, KPMG failed to discharge their duties in adherence to GAAP and GAAS to detect errors
15 and irregularities.

16 485. In performing the auditing and accounting services to Brocade in the manner alleged
17 herein, defendant KPMG owed a duty to Brocade and their shareholders to use such skill, care and
18 diligence as other members of its profession commonly exercised. KPMG, however, breached such
19 duty by committing the wrongful acts and conduct alleged herein.

20 486. Brocade reasonably relied to its detriment on defendant KPMG and was damaged
21 thereby.

22 487. As a direct, foreseeable and proximate result of defendant KPMG's breach of duties
23 owed to Brocade, the Company suffered damages.

COUNT XX

Against Defendant KPMG for Breach of Contract

26 488. Plaintiff incorporates by reference and realleges each and every allegation set forth
27 above, as though fully set forth herein.

1 489. At times relevant hereto, defendant KPMG and Brocade were parties to written
2 contracts pursuant to which KPMG agreed to provide audit services to Brocade in accordance with
3 GAAS.

4 490. Defendant KPMG breached its contracts with Brocade by, among other things, failing
5 to render services in accordance with GAAS and preparing and/or approving financial statements
6 that were not prepared in accordance with GAAP.

7 491. As a direct and proximate result of defendant KPMG's breaches of contract, Brocade
8 has sustained damages, as alleged herein.

COUNT XXI

Professional Negligence and Legal Malpractice Against Defendant WSGR

12 492. Plaintiff incorporates by reference and realleges each and every allegation contained
above as though fully set forth herein.

493. Defendant WSGR committed professional negligence and legal malpractice with
14 respect to the legal opinions that the firm gave to the Board with respect to legality of the steps taken
15 by defendants alleged herein to carry out the stock option backdating, including, *inter alia*, the
16 advice given by WSGR to Brocade with respect to the part-time program. WSGR also committed
17 professional negligence and legal malpractice in connection with its advice that Brocade should enter
18 into the Proposed Settlement to resolve the derivative claims alleged in the State Derivative Action
19 and Federal Derivative Action arising out of the backdating activity alleged herein on terms and
20 conditions that were did not represent a fair, reasonable or adequate resolution of such claims.

22 494. Further, defendant WSGR violated Rule 3-110 of the California Rules of Professional
23 Conduct in that it intentionally, recklessly and repeatedly failed to perform legal services with
24 competence. WSGR also violated Rule 3-210 because it advised Brocade to violate applicable law
with respect to the disclosure of backdated stock options and with respect to the part-time program.

25 495. Defendant WSGR also violated Rule 3-310(c) because it failed to properly obtain a
26 waiver of a conflict of interest arising from the firm's representation of the Company and defendant
27 Sonsini and the other Individual Defendants' interests.

1 496. The negligent acts or omissions by defendant WSGR alleged herein constitute failures
2 by WSGR to use such skill, prudence and diligence as lawyers of ordinary skill and capacity
3 commonly possess and exercise in the performance of similar tasks of which they undertake.

4 497. Such negligent acts or omissions by defendant WSGR caused and will continue to
5 proximately cause damage to Brocade, which reasonably relied to its detriment upon the negligent
6 legal advice proffered to the Company by defendant WSGR.

COUNT XXII

Against Defendant WSGR for Breach of Contract

9 498. Plaintiff incorporates by reference and realleges each and every allegation set forth
10 above, as though fully set forth herein.

11 499. At times relevant hereto, defendant WSGR and Brocade were parties to written
12 contracts pursuant to which WSGR agreed to provide legal services to Brocade in accordance with
13 the California Rules of Professional Conduct.

14 500. Defendant WSGR breached its contracts with Brocade by, among other things, failing
15 to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess
16 and exercise in the performance of similar tasks of which they undertake, and its failure to render
17 services in accordance with the California Rules of Professional Conduct.

18 501. As a direct and proximate result of defendant WSGR's breaches of contract, Brocade
19 has sustained damages, as alleged herein.

PRAYER FOR RELIEF

21 WHEREFORE, plaintiff demands judgment as follows:

22 A. Against all of the Individual Defendants and in favor of Brocade for the amount of
23 damages sustained by the Company as a result of the Individual Defendants' violations of and
24 conspiracy to violate RICO breaches of fiduciary duties and conspiracy to breach such duties, unjust
25 enrichment, violations of state law prohibitions on insider selling codified in California Corporations
26 Code sections 25402 and 25403 and corporate waste;

27 B. Determining and awarding Brocade treble damages pursuant to 18 U.S.C. §1964 for
28 the RICO Defendants' violations of RICO, 18 U.S.C. §1962(c);

1 C. Declaring that defendants Reyes and Canova are liable under §302 of the SOX, and
 2 requiring them to reimburse Brocade for all bonuses or other incentive based or equity based
 3 compensation received by them during the period in which Brocade has restated its financial results;

4 D. Against all of the Individual Defendants and in favor of Brocade for the amount of
 5 damages sustained by the Company as a result of the Individual Defendants' violations of and
 6 conspiracy to violate breaches of fiduciary duties and conspiracy to breach such duties, unjust
 7 enrichment, violations of state law prohibitions on insider selling codified in California Corporations
 8 Code sections 25402 and 25403 and corporate waste;

9 E. Determining and awarding Brocade treble damages pursuant to California
 10 Corporations Code section 25502.5(a) for the Insider Selling Defendants' violations of California
 11 Corporations Code section 25402;

12 F. Determining and awarding Brocade treble damages against the Director Defendants
 13 pursuant to California Corporations Code section 25403 for the Insider Selling Defendants'
 14 violations of California Corporations Code section 25402;

15 G. Determining and awarding Brocade punitive damages against defendants Reyes,
 16 Jensen, Byrd and Canova pursuant to California Civil Code sections 1709 and 1710;

17 H. Directing Brocade to take all necessary actions to reform and improve its corporate
 18 governance and internal procedures to comply with applicable laws and to protect the Company and
 19 its shareholders from a repeat of the damaging events alleged herein, including, but not limited to,
 20 putting forward for shareholder vote resolutions for amendments to the Company's Bylaws or
 21 Articles of Incorporation and taking such other action as may be necessary to place before
 22 shareholders for a vote the following enhancements to and improvements for Brocade's corporate
 23 governance policies:

24 1. a proposal to strengthen the Board's supervision of operations and develop and
 25 implement procedures for greater shareholder input into the policies and guidelines of the Board;

26 2. a proposal to ensure that all stock options granted to executive and non-
 27 executive employees are properly awarded, valued and administered;

28 3. control and limit insider stock selling;

1 4. a provision to permit the shareholders of Brocade to nominate at least three
 2 candidates for election to the Board;

3 5. appropriately test and then strengthen internal audit and control functions; and
 4 6. a proposal to remove all defendants in this case from Brocade's board of
 5 directors.

6 I. Extraordinary equitable and/or injunctive relief as permitted by law, equity and state
 7 statutory provisions sued hereunder, including attaching, impounding, enjoining the indemnification
 8 of any defendant who failed to act in good faith and in a manner that he or she reasonably believed
 9 to be in the best interest of the Company and who did not have reasonable cause to believe that his or
 10 her conduct was unlawful, imposing a constructive trust on or otherwise restricting the proceeds of
 11 defendants' trading activities or their other assets so as to assure that plaintiffs on behalf of Brocade
 12 have an effective remedy;

13 J. Directing an accounting of all stock option grants awarded from November 1999 to
 14 the present, including, without limitation, the grant dates, exercise dates, value, amount and
 15 recipients of all such grants, as well as the disposition of any proceeds received by the recipients of
 16 any options that were backdated via an exercise, sale, gift or any other transfer of any such option;

17 K. Directing that all the unexercised backdated options granted to defendants since 1999
 18 be cancelled, ordering the financial gains obtained via the exercise of such stock options returned to
 19 the Company, and ordering to have Brocade revise the Company's financial statements to reflect the
 20 truth concerning these option grants;

21 L. Declaring that any improperly-backdated stock options, and all proceeds derived from
 22 exercise thereof, and any assets or other property acquired in connection therewith, are and have
 23 been held in constructive trust for the Company's benefit from the true grant date of the manipulated
 24 stock options and other equity or incentive-based compensation;

25 M. Imposing a constructive trust on all proceeds derived from the exercise of any
 26 improperly-backdated stock options and any property acquired in connection therewith;

27 N. Awarding to Brocade restitution from defendants, and each of them, and ordering
 28 disgorgement of all profits, benefits and other compensation obtained by defendants through the

1 | improper backdating of stock option grants;

2 O. Imposing a constructive trust on any profits the Insider Selling Defendants obtained
3 by the sale of any Brocade shares while in possession and control of material adverse, non-public
4 information relative to the backdating of Brocade stock options as alleged herein;

5 P. Declaring that defendants Reyes, Jensen, House, Klayko, Deranleau, Malavalli,
6 Canova, Byrd, Dempsey, Vaswani, Krause, Walker, Neiman, Moore, Paisley, O'Brien, Sonsini and
7 Leslie are not entitled to indemnification from Brocade and must therefore return all advanced legal
8 fees, expenses and other funds;

9 Q. Awarding to Brocade restitution from defendant KPMG and ordering disgorgement
10 of all profits, benefits and other compensation obtained by KPMG for its failure to properly audit the
11 Company's financial statements in accordance with professional standards;

12 R. Awarding to Brocade restitution from defendant WSGR and ordering disgorgement
13 of all profits, benefits and other compensation obtained by WSGR for its failure to properly perform
14 legal services in accordance with the California Rules of Professional Conduct;

15 S. Awarding to plaintiff the costs and disbursements of the action, including reasonable
16 attorneys' fees, accountants' and experts' fees, costs and expenses; and

17 T. Granting such other and further relief as the Court deems just and proper.

JURY DEMAND

19 Plaintiff demands a trial by jury.

20 || DATED: July 21, 2008

JOHNSON BOTTINI, LLP
FRANK J. JOHNSON
FRANCIS A. BOTTINI, JR.
DEREK J. WILSON

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Counsel for Plaintiff

I hereby verify that I am a shareholder of Brocade Communications Systems, Inc. (the "Company"), and am ready, willing, and able to pursue this action in the hope of improving the Company and recovering damages for the Company caused by defendants' conduct. I have reviewed the allegations made in this Amended Shareholder Derivative Complaint. The allegations pertaining to me and my holdings of stock in the Company are true based on my personal knowledge. As to those allegations of which I do not have personal knowledge, I rely upon my counsel and their investigation and believe them to be true. Having received a copy of this Amended Complaint, having reviewed it with my counsel, I hereby authorize its filing.

Date: 7-21-08

Mary E. Barbour

Mary E. Barbour, as Trustee of the
Mary E. Barbour Family Trust One